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Supreme Court of the United States

OCTOBER TERM, 1996

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY AND CHARLES J. SCHAFFER, JR., its administrator and fiduciary, *Petitioners*,

v.

FEDERAL EXPRESS CORPORATION;
THE FLYING TIGER LINES, INC.;
WARREN TRANSPORT, INC.;
TIGER INTERNATIONAL, INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a multiemployer pension plan must show that a don*ee* of a business with substantial withdrawal liability debt had wilful criminal intent to defraud a pension plan in accepting a gift in order to impose civil liabilty on the don*or* by disregarding the gift as a transaction with a principal purpose to evade or avoid withdrawal liability within the meaning of 29 U.S.C. § 1392 (c).

2. Whether the "presumption of correctness" in 29 U.S.C. § 1401(a)(3)(A) accorded to a factually detailed determination of a fraudulent conveyance and a transaction to evade withdrawal liability may be overcome by the testimony of an interested witness at trial concerning "plausible and valid" reasons for a sale even though those reasons have no support in contemporaneous documents nor the testimony of disinterested witnesses and do not explain a $15 Million sales discount nor other aspects of the actual transaction without material impetus from withdrawal liability.

3. Whether a multiemployer plan reasonably determined that both groups emerging from a division of a control group "employer" remain jointly and severally liable for unpaid pension liability which accrued in annual pieces during the period of affiliation.

LIST OF PARTIES

Parties to the proceedings below were the Petitioners, Teamsters Pension Trust Fund of Philadelphia and Vicinity, its trustees and Charles J. Schaffer, Jr., its administrator and a fiduciary charged with collection of withdrawal liability. The Teamsters Pension Trust Fund of Philadelphia and Vicinity is a trust under 29 U.S.C. § 186(c)(5) whose trustees sponsor a multiemployer plan and an employee pension benefit plan under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1002(2), (37)(A), 1301(a)(3).

The Respondent before this Court is Federal Express Corporation ("FedEx"). FedEx is a corporate successor, by merger, to Tiger International, Inc. whose subsidiaries included The Flying Tiger Lines, Inc. and Warren Transport, Inc. The status of any other parent company, subsidiary or affiliate of FedEx (within the meaning of Rule 29.1 of this Court) is not currently known to Petitioners.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF CASE	6
REASONS FOR GRANTING THE WRIT	15
I. THE THIRD CIRCUIT'S "GOOD FAITH" STANDARD REQUIRING PROOF OF CRIMINAL FRAUDULENT INTENT BY A TRANSFEREE TO IMPOSE CIVIL PENSION LIABILITY ON A TRANSFEROR IS IN CONFLICT WITH OTHER CIRCUITS	17
II. THE ISSUES PRESENTED ARE IMPORTANT TO PREVENT DUMPING OF UNFUNDED PENSION LIABILITY IN THE BILLIONS ON OTHER EMPLOYERS AND THE FEDERAL GOVERNMENT	23
CONCLUSION	26
APPENDIX	
Third Circuit Order, *Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp.*, 96 F.3d 1432 (3d Cir. 1996) (table)	1a

TABLE OF CONTENTS—Continued

Page

Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp., 1995 WL 791371, 20 E.B.C. 1050 (D.Del. 1995) 5a

Third Circuit Sur Petition for Rehearing *Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp.*, 96 F.3d 1432 (3d Cir. 1996) (table) 24a

Demand Letter & Determination, *Teamsters Pension Trust Fund of Philadelphia & Vicinity* (January 20, 1988) 27a

Supplemental Demand Letter & Determination, *Teamsters Pension Trust Fund of Philadelphia & Vicinity* (December 2, 1988) 41a

Review Response & Determination, *Teamsters Pension Trust Fund of Philadelphia & Vicinity* (December 2, 1988) 43a

Flying Tiger Line - and - Teamsters Pension Trust Fund of Philadelphia & Vicinity, 19 E.B.C. 2830 (Nagle, Arb. 1993) 72a

TABLE OF AUTHORITIES

Cases — Page

American Hospital Association v. NLRB, 499 U.S. 606, 111 S.Ct. 1539, 113 L.Ed.2d 675 (1991) 20

Beacon Auto Radiator Co., Inc. v. Comm'r, 52 T.C. 155 (1969) 22

Bobsee Corp. v. U.S., 411 F.2d 231 (5th Cir. 1969) 21

Botany Worsted Mills v. U.S., 278 U.S. 282, 49 S.Ct. 129, 73 L.Ed. 379 (1929) 17

Central States, S.E. & S.W.A. Pension Fund v. Robinson Cartage, 55 F.3d 1318 (7th Cir. 1995) 24

Central States, S.W. & S.W.A. Pension Fund v. Santa Fe Industries, 22 F.3d 725 (7th Cir. 1994) .... *passim*

Cheek v. U.S., 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) 19

Coastal Oil Storage v. Comm'r, 242 F.2d 396 (4th Cir. 1957) 21

Combs v. Classic Coal Corporation, 931 F.2d 96 (D.C. Cir. 1991) 17

Comm'r v. Tufts, 461 U.S. 300, 103 S.Ct. 1826, 75 L.Ed.2d 863 (1983) 25

Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) 16, 17

Cuyamaca Meats, Inc. v. San Diego & I.C. Butchers Pension Fund, 638 F. Supp. 885 (S.D. Cal. 1986) 18

Dillier v. Comm'r, 41 T.C. 762 (1964) 22

Dorn's Transportation v. Teamsters Pension Trust Fund of Philadelphia and Vicinity, 787 F.2d 897 (3d Cir. 1986) 18

Douglas Guardian Warehouses v. Jones, 405 F.2d 427 (10th Cir. 1969) 20

Duncan v. First Nat'l Bank of Cartersville, Ga., 597 F.2d 51 (5th Cir. 1979) 20

Flying Tiger Line v. Central States S.E. & S.W.A. Pension Fund, 7 E.B.C. 2385 (D. Del. 1986) 2

TABLE OF AUTHORITIES—Continued

Page

Flying Tiger Line v. Central States S.E. & S.W.A. Pension Fund, 659 F. Supp. 13 (D. Del. 1986) 2
Flying Tiger Line v. Central States S.E. & S.W.A. Pension Fund, 8 E.B.C. 1241, 1986 WL 14904 (D. Del. 1986) 2
Flying Tiger Line v. Central States S.E. & S.W.A. Pension Fund, 704 F. Supp. 1277 (D. Del. 1989) 2
Flying Tiger Line v. Central States S.E. & S.W.A. Pension Fund, 715 F. Supp. 1284 (D. Del. 1989) 2
Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia and Vicinity, 830 F.2d 1241 (3d Cir. 1987) 2, 15, 16, 22, 25
Flying Tiger Line - and - Teamsters Pension Trust Fund of Philadelphia & Vicinity, 19 E.B.C. 2830 (Nagle, Arb. 1993) .... *passim*
Herculite Protective Fabrics Corp. v. Comm'r, 387 F.2d 475 (3d Cir. 1968) 17, 21
House Beautiful Homes v. Comm'r, 405 F.2d 61 (10th Cir. 1968) 21
In Re: Juvenile Shoe Corp. of America, 99 F.3d 898 (8th Cir. 1996) 25
Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950) 21, 23
PBGC v. LTV Corp., 496 U.S. 633, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) 24
PBGC v. White Consolidated Industries, 998 F.2d 1192 (3d Cir. 1993) 18
Price Waterhouse v. Hopkins, 409 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) 19
Scroll, Inc. v. Comm'r, 447 F.2d 612 (5th Cir. 1971) 17, 21
Shannon v. U.S., 512 U.S. 573, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994) 21
Slappey Drive Industrial Park v. U.S., 561 F.2d 572 (5th Cir. 1977) 21
Southeastern Canteen Co. v. Comm'r, 410 F.2d 615 (6th Cir. 1969) 21

TABLE OF AUTHORITIES—Continued

	Page
Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Brigadier Leasing, 880 F. Supp. 388 (E.D. Pa. 1995)	14
Trustees of Amalgamated Insurance Fund v. McFarlin's, 789 F.2d 98 (2d Cir. 1986)	25
Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp., 96 F.3d 1432 (3d Cir. 1996) (table)	1
Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp., 1995 WL 791371, 20 E.B.C. 1050 (D. Del. 1995)	1
Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Fuqua Industries, Inc., 509 U.S. 901, 113 S.Ct. 2989, 125 L.Ed.2d 684 (1993)	16
Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Fuqua Industries, Inc., 981 F.2d 1248 (3d Cir. 1992) (table)	16
Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Fuqua Industries, Inc., 1992 WL 70418, 15 E.B.C. 2271 (E.D. Pa. 1992)	17
U.S. v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976)	17
U.S. v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. 1986)	19
U.S. v. Yellow Cab Co., 338 U.S. 338, 70 S.Ct. 177, 94 L.Ed. 150 (1949)	23
Vulcan Materials Co. v. U.S., 446 F.2d 690 (5th Cir. 1971)	17, 21
In Re: Woodfield, 978 F.2d 516 (9th Cir. 1992)	20
Statutes	
Bankruptcy Code, 11 U.S.C. § 547	12
Internal Revenue Code, Title 26 U.S.C.	
26 U.S.C. § 269	3, 17
26 U.S.C. § 269(a)	21
26 U.S.C. § 404	25
26 U.S.C. §§ 1501-1504	25

TABLE OF AUTHORITIES—Continued

	Page
Judicial Code, Title 28 U.S.C.	
28 U.S.C. § 1254(1)	3
28 U.S.C. § 2101(c)	3
National Labor Relations Act, 29 U.S.C. § 186 (c)(5)	ii
Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1001 et seq.	
29 U.S.C. § 1002(2)	ii
29 U.S.C. § 1002(37)(A)	ii
29 U.S.C. § 1301(a)(3)	ii
29 U.S.C. § 1301(b)	6, 8, 12
29 U.S.C. § 1301(b)(1) (1976)	4, 16
29 U.S.C. § 1362(d) (1976)	5, 25
29 U.S.C. § 1362(d)(3) (1976)	6
29 U.S.C. § 1369	18, 24
29 U.S.C. § 1381(a)	24
29 U.S.C. § 1392(c)	*passim*
29 U.S.C. § 1398 (1976)	5, 6, 25
29 U.S.C. § 1401	15
29 U.S.C. § 1401(a)(3)(A)	i, 4, 16
Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, § 405, 29 U.S.C.A. § 1461 note (uncodified)	24
Rules	
Federal Rules of Appellate Procedure, Title 28 U.S.C. Appendix	
Rule 35	3
Rule 40	3
Supreme Court Rule 29.1	ii
Third Circuit Rule 12(6)	2
Third Circuit, Internal Operating Procedures	
9.5.1	3
6.2.2(d)	18
Other	
1996 Green Book	24
Pension Benefit Guaranty Corporation, Press Release 97-09	24

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OPINIONS BELOW

The judgment order of the Court of Appeals for the Third Circuit is reported in table format at 96 F.3d 1432 (table) and is reprinted in the Appendix to this Petition, p. 1a, along with the order on the petition for rehearing, p. 24a. The memorandum decision of the District Court is published as *Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp.*, 1995 WL 791371, 20 Employee Benefits Cas. (E.B.C.) 1050 (D. Del. 1995). It is reprinted in the

Appendix to this Petition, page 5a. The decision of Arbitrator Robert E. Nagle is reported at 19 E.B.C. 2830. It is reprinted in the Appendix to this Petition, p. 72a. The determinations of the Fund are reprinted in the Appendix at pp. 27a, 41a, 43a. They are not reported.

This petition arises from a suit by Tiger International, Inc. and its affiliates against Petition and other multiemployer plans in Delaware for a declaration that it was not an "employer" responsible for withdrawal liability. *See, Flying Tiger Line v. Central States S.E. & S.W.A. Pension Fund*, 7 E.B.C. 2385 (D. Del. 1986) (case is not arbitrable); *Flying Tiger Line v. Central States S.E. & S.W.A. Pension Fund*, 659 F. Supp. 13, 7 E.B.C. 2392 (D. Del. 1986) (on reargument, case is subject to arbitration); *Flying Tiger Line v. Central States S.E. & S.W.A. Pension Fund*, 8 E.B.C. 1241, 1986 WL 14904 (D. Del. 1986) (certification of appeal); *Flying Tiger Line, Inc. v. Central States, S.E. & S.W.A. Pension Fund*, 659 F. Supp. 13, 7 E.B.C. 2392 (D. Del. 1986) (denying motion for certification of defendant class); *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 830 F.2d 1241, 8 E.B.C. 2505 (3d Cir. 1987) (claims were subject to statutory arbitration under 29 U.S.C. § 1401). In *Flying Tiger Line v. Central States S.E. & S.W.A. Pension Fund*, 704 F. Supp. 1277, 10 E.B.C. 1882 (D. Del. 1989), the United States District Court for the District of Delaware directed the arbitration leading to the present petition. See further, *Flying Tiger Line, Inc. v. Central States, S.E. & S.W.A. Pension Fund*, 715 F. Supp. 1284, 11 E.B.C. 1219 (D. Del. 1989) (attorney fee issues). These decisions and order are not involved in this Petition and have not been reproduced.

STATEMENT OF JURISDICTION

A panel of the United States Court of Appeals for the Third Circuit entered a judgment order under Rule 12(6) (3d Cir.), on August 20, 1996, p. 1a. The judg-

ment affirmed an order of the United States District Court for the District of Delaware, p. 5a. A timely combined petition for rehearing by the panel and suggestion of rehearing *in banc* pursuant to Fed.R.App.Pro. 40, 35 and Internal Operating Procedure 9.5.1 (3d Cir.) was filed on September 3, 1996. The petition for rehearing was denied on October 21, 1996, p. 24a. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2101(c) on a petition for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Third Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 269. *Acquisitions made to evade or avoid income tax*

(a) In General—If—

(1) any person or persons acquire, or acquired on or after October 8, 1940, directly or indirectly, control of a corporation, or

(2) any corporation acquires, or acquired on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation,

and the principal purpose for which such acquisition was made is evasion or avoidance of federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then the Secretary may disallow such deduction, credit or other allowance. For purposes of paragraphs (1) and (2), control means the ownership of

stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock of the corporation.

29 U.S.C. § 1392(c). *Obligation to Contribute; Special Rules*

(c) If a principal purpose of any transaction is to evade or avoid withdrawal liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

29 U.S.C. § 1401(a)(3)(A). *Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.*

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of evidence that the determination was unreasonable or clearly erroneous.

29 U.S.C. § 1301(b)(1)(1976). *Definition.*

(b)(1) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

Section 405, Pub. L. 96-364.

"(a) Except as otherwise provided in the amendments made by [the Multi-employer Pension Plan Amendments Act, P.L. 96-364] and in subsection (b), if the way in which any such amendment will apply to a particular circumstance is to be set forth in regulations, any reasonable action during the period before such regulations take effect shall be treated as complying with such regulations for such period.

"(b) Section (a) shall not apply to any action which violates any instruction issued, or temporary rule prescribed, by the agency having jurisdiction but only if such instruction or rule was published, or furnished to the party taking the action, before such action was taken."

29 U.S.C. § 1398 (1976) (obsolete). *Withdrawal not to occur merely because of change in business form or suspension of contributions during labor dispute.*

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—

(1) an employer ceases to exist by reason of—

(A) a change in corporate structure described in section 1362(d) of this title, or

(B) a change to an unincorporated form of business enterprise, if the change causes no interruption in employer contributions nor obligations to contribute under the plan, or

* * * *

For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

29 U.S.C. § 1362(d)(1976)(obsolete). *Liability of employer*

(d) Corporate reorganizations

For purposes of this section the following rules apply in the case of certain corporate reorganizations:

(1) If an employer ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however effected, a successor corporation resulting from such reorganization shall be treated as the employer to whom this section applies.

(2) If an employer ceases to exist by reason of a liquidation into a parent corporation, the parent corporation shall be treated as the employer to whom this section applies.

(3) If an employer ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the employer to whom this section applies.

STATEMENT OF CASE

This case concerns a decision of the United States Court of Appeals for the Third Circuit which overturned a determination of the Trustees of the Teamsters Pension Trust Fund of Philadelphia & Vicinity ("Philadelphia Fund" or "Fund") that Federal Express Corporation f/k/a Tiger International Corporation ("FedEx" or "Tiger") was liable to the Fund for withdrawal liability pursuant to 29 U.S.C. §§ 1392(c), 1398, 1301(b) following the shutdown of Tiger's former subsidiary, Hall's Motor Transit Company ("Hall's").

Hall's was solvent and profitable when Tiger International Corp. acquired 100% of the stock of Hall's Motor Transit for $45,198,000 in January 1980. Hall's remained a wholly-owned subsidiary of Tiger International, Inc. until January 1985 when Tiger "sold" the stock of Hall's to Hall's Acquisition Corporation, a corporation

formed by Hall's chief financial officer, Alvin Bodford, for $1,000. The entire unamortized withdrawal liability due to the Fund admittedly accrued during this period of common control.

Later in 1980, Tiger acquired two other trucking companies, Warren Transport, a profitable truckload carrier, and Dohrn Transfer, a very troubled Midwestern "less-than-truckload" carrier. Tiger merged Dohrn's into Hall's in April, 1981 and added another $15 million in withdrawal liability and additional $12 million in bank debt to Hall's balance sheet. Tiger abandoned Hall's traditional business and merged Dohrn into Hall's in a grand shot at "one-stop" shopping on combined air, rail and transportation services in conjunction with other Tiger affiliates. With the new Dohrn's debt imposed by Tiger and loss of traditional business, Hall's went into a downward spiral from which it never recovered.

Tiger and its creditors were well aware of Tiger's responsibility for unpaid pension debt of Hall's or other subsidiaries. The potential liability was tracked by Arthur Andersen, Tiger's auditors, based on fund confirmations from 1981 forward and was noted in annual financial statements. In 1983, Tiger and its affiliates defaulted on various debt and Flying Tiger, Tiger's principal operating company, and Tiger executed the "Override Agreement" to cure defaults on approximately $588 million of debts in December 1983. The Override Agreement had a unique default clause that was triggered by the assessment of withdrawal liability (or other pension debt) against Tiger or Flying Tiger in an amount over $5 million.

In December 1983, Tiger also executed a promissory note (the "Tiger Note") for $132 million which was pledged to lenders for advances previously made to Tiger by North American Car Corporation ("NAC") or "North American"), another Tiger subsidiary, as part of NAC's restructuring agreements. The Tiger Note was due in

1991, but would be accelerated upon a default under the main NAC restructuring agreement or the Override Agreement. Tiger also restructured Hall's inherited Dohrn's debt with Prudential Capital and Exchange National Bank in 1983 through a new agreement involving Heller Financial—with a default clause in the absence of continuing Tiger ownership.

The refinancing did not stop the red ink at Hall's. Arthur Andersen gave qualified opinions for Hall's from 1982 forward based on Hall's working capital deficits, declining net equity, a proprietary failure model showing an 86% likelihood of near-term failure for Hall's and other factors. By early March, 1984, Alvin Bodford, the chief financial officer of Hall's, was telling Tiger that Hall's was going nowhere and that something had to be done or Hall's would be out of business. In March, 1984, Wayne Hoffman, the chief executive officer of Tiger, dispatched James Cronin, his special assistant "to determine what was going on at Hall's to make a recommendation as to what should be done."

By May 10, 1984, Robert J. Harter, Tiger's in-house counsel and a bankruptcy lawyer, prepared a set of materials for a Tiger Finance Committee meeting, explaining the problems at Hall's in light of the liability of a parent corporation for withdrawal liability under 29 U.S.C. § 1301(b).

Hall's Motor Transit Company

1. *Potential Net Worth Default.* If operating results do not improve, Hall's will violate the net worth covenant in its major loan agreement. Unless a waiver is obtained, this default could lead Hall's lenders to foreclose on the equipment and accounts receivable which secure this debt.

2. *MEPA Liability.* Tiger's *exposure* results from Hall's $35,000,000 multiemployer pension plan liability.

(emphasis supplied). On May 16, 1984, six days after the Finance Committee meeting, Hoffman announced Cronin's appointment as president of Hall's. Despite Cronin's appointment, Hall's financial performance continued to decline.

By October 1984, John Lafferty of Arthur Andersen requested a meeting with Mr. Cronin because the "outlook for [Hall's] continuing operations [was] very uncertain" and "survival [was] . . . the number one issue." Mr. Lafferty "documented" a meeting with Cronin on October 6, 1984 in a contemporaneous memo:

> Yesterday I met with Jim Cronin, President and Chief Executive Officer to discuss with him the current operating situation at Hall's and his outlook for the future. . . . I spent approximately one hour with Cronin and he very candidly acknowledged that the outlook for continued operations is very uncertain and that he and Tiger management are considering various alternatives at the present time. . . .
>
> * * * *
>
> As a result of the above two meetings, several things are noteworthy and I have listed them below simply to document them— . . . .
>
> 4) Cronin mentioned the multi-employer pension liability (approximately $35 million) several times in several contexts. It's clear that *he* and *Tiger* have focused on this as a real obstacle to doing something with Hall's.
>
> 5) Cronin discussed the recent tender offer by Time-DC for Transcon and suggested that it might also be motivated by the multi-employer pension liability. This offer was written up in the last issue of *Transport Topics* on page 1.

Although Cronin's memory conveniently lapsed, Mr. Lafferty's "documentation" is corroborated by a press release from William ("Bill") Legg of Alex Brown &

Sons, whom Cronin had previously consulted, on October 5, 1984, about the structuring of the TIME-DC offer to avoid withdrawal liability.

On November 2, 1984, the collateral agent for certain bank lenders to Tiger's North American Car Corporation subsidiary advised Tiger that a net worth default had occurred as of September 30, 1984. This claim of default was not a surprise as it was was part of an ongoing problem with recalcitrant North American lenders and a settlement was reached to avoid default through a major public offering of depository convertible preferred stock in February 1995.

Tiger (and Alvin Bodford, Hall's CFO and the eventual "buyer" of the company) knew that Hall's would be out of cash and collapse by mid-January 1985 so as to trigger withdrawal liability and the related default clause in the Override Agreement. Tiger immediately engaged Alex Brown & Sons to sell Hall's "now and cheap." Tiger's drive to close, despite better offers, was explained in a memorandum dated December 29, 1984 by Martin Imm of Prudential.

> Recent problems at Tiger International (Hall's 100% owner) have led to its decision to *precipitously sell* 75% of its interest in Hall's to its management for a nominal amount.
>
> Tiger plans to file a registration statement for some debt it is proposing to issue in the near future. *By selling its control this weekend, prior to filing the registration statement, Tiger will avoid disclosing the large potential liability Tiger might face under Hall's multi-employer union contract if Hall's should fail . . .*

(emphasis supplied). The disclosure related to the fact that an assessment of withdrawal liability of $5 Million or more was an event of default under Tiger's Override Agreement covering some $588 Million in debt.

On December 5, 1996, Whit Lee proposed an acquisition of Hall's for the $15-20 Million price (60% of book equity) sought by Cronin and Alex Brown on an orderly basis and subject to due diligence.

Alex Brown's internal notes show a December 6 call to Lee:

> 12/6 Questions for Whit:
>
> —Close by year end?
>
> —Is $2.5 [the cash portion of the offer] real available?
>
> —How real is ability to finance deal and make viable? (*Meppa concern*)
>
> —Steps to closing

Lee cut his price to $1,000 in response for reasons documented by a contemporaneous memorandum of Donald Goffman from Exchange Bank of a December 19, 1984 meeting of Cronin, Bodford, Hall's lenders and Lee:

> He [Lee] went on to explain that he saw a need for $5 million in cash for Hall's to get them through the first three period (January-March). Given that comment I asked Mr. Lee what we could expect from him as a capital infusion as its new owner to which he replied, "None!"
>
> Needless to say, this surprised all attendants, especiallly Mr. Cronin. It was his understanding that the new owner would contribute somewhere between $5 million to $10 million. Therefore, it was Mr. Lee's plan all along for Tiger to finance the buyout of itself while the current lenders pumped in another $5 million to keep Hall's going. Wherein, Mr. Lee would then be around if and when Hall's became profitable. *It was Mr. Lee's contention that upon consummation of the transaction, his risk would be the assumption of a $38 million unsecured and unfunded liability arising from the company's pension plan.*

(emphasis supplied). Whit Lee's December 19, 1984 proposal was literally an offer to Tiger to take Hall's withdrawal liability off Tiger's hands for $1,000. Tiger was willing to accept immediately.

Lee overplayed his hand with boasts of his use of bankruptcy proceedings to reject labor contracts at IML Freight and alienated Hall's lenders who had to join the deal. The lenders had no loan agreement nor security with Terminal Rental, Inc. ("TRI"), Hall's real estate holding company and subsidiary. The real estate assets of TRI, as a trade or business under common control, would thus fall to pension creditors under 29 U.S.C. § 1301(b) in the event that Hall's shutdown and triggered liability. The lenders wanted additional security in the real estate of Hall's and its Terminal Rental subsidiary in order to be "S[enio]r to MEPA [withdrawal liability claims]" in a Hall's bankruptcy. They feared that Lee would put Hall's in bankruptcy to avoid labor contracts (as he had done with IML Freight) and that the bankruptcy would invalidate the new security as a preference under 11 U.S.C. § 547.

Hoffman explained that Tiger gave the company away to Bodford in desperation for the $1,000 and terms proposed by Lee, even though he was not a 'credible buyer," because Tiger had run out of "reasonable alternatives" to meet the December 31 disclosure deadline. Bodford understood ". . . that Tiger expected Hall's to assume the [withdrawal] liability but, in essence, knew they couldn't get away from the liability." Bodford jumped in to take the Company for nothing as he had nothing to lose and did not want it to be given away to an outsider. Bodford confirmed this in a 1985 letter to Tiger noting that the sale was not a *bona fide* arms-length transaction.

While the lenders' internal notes indicated that "Bodford not to be CEO," Hall's lenders waived a default by reason of a lack of Tiger ownership and consented to the

sale when Tiger and Bodford gave the lenders new security. The Hall's lenders got real estate collateral worth $36 million for a $5 million line of credit (a net advance of $2.5 million over existing lines) with no future commitment for additional credit to Hall's or Terminal Rental. The loans were explicitly done on an "asset-based financing" protocol rather than on the basis of projected earnings of Hall's.

The Tiger Board of Directors approved the sale of 75% of Hall's for $1,000 in a telephone conference on New Year's Eve, December 31, 1984 at 9:00 a.m. Neither Cronin, Hoffman nor any contemporaneous Tiger documents provide any rationale for the Bodford giveaway to the Board. Bodford found the "whole process . . . very amusing."

On January 7, 1995, Tiger "sold" 75% of the equity of Hall's for one thousand dollars. Tiger paid $1 Million in closing costs, agreed to continue its guarantees and bonds related to Hall's insurance coverage needs for one year after the sale and reduced its claim against Hall's by $1.3 Million. Tiger got a subordinated security interest for its $10.5 million inter-company debt against a future Hall's bankruptcy. By the end of 1985, Tiger had completely written off the note as worthless. Tiger also retained a nominal 25% equity share in Hall's but immediately wrote it off in full on December 31, 1984 to show a complete loss of its investment in Hall's as a discontinued operation. Bodford's *quid pro quo* was an explicit agreement not "to take any action which might result in any liability of [Tiger] under MPPAA." Hall's (not Bodford) also agreed to indemnify Tiger for any MPPAA liability Tiger might incur.

Hall's had no reasonable chance of survival after the Bodford giveaway. Its financial condition prevented it from obtaining insurance or worker compensation coverage which was necessary to operate. Tiger agreed to

supply this coverage only for one year—the bankruptcy preference period for an insider under 11 U.S.C. § 547. At the time of the sale, Arthur Andersen noted that the wall-to-wall security interest given to Tiger and the lenders deprived Hall's of any source of cash to fund anticipated losses. Hall's got a temporary reprieve from an agreement with employees for a 15% wage reduction in exchange for an employee stock ownership plan ("ESOP") which ultimately was to hold 40% of the stock of Hall's. By the fall of 1985, however, Hall's losses had mounted to $9 million and Hall's encountered a "severe liquidity crisis."

With Hall's going down the tubes, Bodford scheduled a meeting to redeem all outstanding shares in Hall's, other than Tiger's shares in early December 1985, so as to leave Tiger once again Hall's 100% shareholder with exposure to withdrawal liability. Harter and other responsible Tiger officials were profoundly "embarrassed" that they had made such a planning error in the disposition of Hall's. Tiger agreed to sacrifice its remaining debt interest and all of its remaining equity in Hall's for nothing in order to avoid the "gun to [Tiger's] head" of MPPAA liability. Bodford then canceled the meeting to redeem the stock.[1]

Hall's was pushed into bankruptcy within a month after Tiger and the lenders withdrew support when their new security was no longer subject to attack as a preference in bankruptcy. Hall's filed for reorganization in bankruptcy in March 1986 and shut down operations outside Pennsylvania so as to trigger a duty to pay withdrawal liability to the Central States Southeast & Southwest Areas Pension Fund and other plans at the time. Even though

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[1] After the bankruptcy, Bodford had the $15 Million Hall's net operating loss (NOL) carry forward and acquired Epes Transport where he is now president, *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Brigadier Leasing*, 880 F.Supp. 388 (E.D. Pa. 1995). Like withdrawal liability, use of the multimillion dollar NOL carry forwards of Hall's in an acquisition requires 80% common control.

no withdrawal from the Philadelphia Fund had occurred, Tiger (a Delaware corporation based in Los Angeles) sued the Philadelphia Fund and other multiemployer plans in Delaware for a declaration that it was not an "employer" responsible for withdrawal liability on July 3, 1986 and litigated whether the issues would be tried in court or arbitration. In *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia and Vicinity,* 830 F.2d 1241 (3d Cir. 1987), the Third Circuit found that Tiger's claims were subject to statutory arbitration under 29 U.S.C. § 1401.

Hall's subsequently shut down in Pennsylvania in 1987 and withdrew from the Philadelphia Fund. On January 20, 1988, the Fund assessed Tiger for allocable unfunded vested benefits of $2,100,228 to be paid in 23 quarterly installments of $109,085 and a final payment of $82,904, p. 27a, and issued a detailed factual determination to support its assessment, pp. 43a-71a. Arbitration and judicial review under 29 U.S.C. § 1401 followed.

REASONS FOR GRANTING THE WRIT

Should UPS (the Petitioner's major and largest single contributor) really be required to pay the pension debt of FedEx?

The Third Circuit held that the Fund cannot recover from FedEx without unequivocal proof that Bodford had criminal intent to defraud the Fund in taking a gift of Hall's for $1,000 and that FedEx had no "plausible and valid" reason to dispose of Halls other than evasion of withdrawal liability. In *Central States, S.W. & S.W.A. Pension Fund v. Santa Fe Industries,* 22 F.3d 725, 726-727 (7th Cir. 1994), the Seventh Circuit explicitly rejected this restrictive approach as inconsistent with the plain language of the statute which invalidates any transaction with "a principal transaction to evade or avoid withdrawal liability" even though other motives may be present.

The purpose of withdrawal liability is ". . . to protect other employers in the multiemployer plan from having to pay for those [pension] benefits which are properly the responsibility of other employers," *Santa Fe,* 29 F.3d at 726-727. For this and tax reasons, see p. 25 and n.5, *infra,* the liability extends to a contributing business and trades or businesses under 80% common control, 29 U.S.C. § 1301(b)(1); *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia and Vicinity,* 830 F.2d 1241, 1244 (3d Cir. 1987). 29 U.S.C. § 1392(c) correspondingly provides that "[i]f the principal purpose of any transaction is to evade or avoid withdrawal liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction."

The Fund issued a detailed determination explaining that the gift of Hall's to Bodford was a fraudulent conveyance under common law standards, pp. 49a-58a, which should be disregarded under 29 U.S.C. § 1392(c) so that Tiger and its subsidiaries would remain under common control with Hall's and be liable for the withdrawal liability incurred during common control. All of the contemporaneous documents and disinterested witnesses confirmed these conclusions at trial and showed that the gift to Bodford was driven by a need to avoid an imminent assessment of withdrawal liability.

The uncontested evidence of fraud should have ended the matter as the Fund's determination was presumptively correct under 29 U.S.C. § 1401(a)(3)(A) and Tiger failed to carry its burden of proof to show that withdrawal liability was not an important factor in the gift to Bodford, *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993); *Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Fuqua Industries, Inc.,* 509 U.S. 901, 113 S.Ct. 2989, 125 L.Ed.2d 684 (1993) reversing 981

F.2d 1248 (3d Cir. 1992) (table) and 1992 WL 70418, 15 E.B.C. 2271 (E.D. Pa. 1992) (reversing evade or avoid decision allocating burden of proof on evade or avoid claim under 29 U.S.C. § 1392(c) to Fund for further proceedings under *Concrete Pipe*).[2] The Arbitrator was however a former PBGC official with his own views of the statute which Congress should have written who—as in his prior rulings—merely gave lip service to the presumption while ". . . not in fact afford[ing] the trustees' determination the benefit of the presumption," *Combs v. Classic Coal Corporation,* 931 F.2d 96, 100 (D.C. Cir. 1991) (reversing Nagle on this basis). The Third Circuit effectively reversed *Concrete Pipe* and *Fuqua* with its unqualified endorsement of the arbitrator's impossible standard as a correct statement of the law in a *per curiam* decision to deflect further review in this Court.

I. THE THIRD CIRCUIT'S "GOOD FAITH" STANDARD REQUIRING PROOF OF CRIMINAL FRAUDULENT INTENT BY A TRANSFEREE TO IMPOSE CIVIL PENSION LIABILITY ON A TRANSFEROR IS IN CONFLICT WITH OTHER CIRCUITS

If the gift of Halls to Bodford for $1,000 in this case is not an example of "a transaction with a principal purpose to evade or avoid" pension liability which is disregarded under 29 U.S.C. § 1392(c), there is no such case and the statute is meaningless. The Third Circuit nonetheless rejected the Fund's determination based on its conclusion that 29 U.S.C. § 1392(c) is merely a "good

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[2] The rule of *Concrete Pipe* is consistent with the rule applied to tax cases under the parallel language of 26 U.S.C. § 269. See, *Herculite Protective Fabrics Corp. v. Comm'r,* 387 F.2d 475, 476 (3d Cir. 1968); *Scroll, Inc. v. Comm'r,* 447 F.2d 612, 616 (5th Cir. 1971); *Vulcan Materials Co. v. U.S.,* 446 F.2d 690, 698-699 (5th Cir. 1971). It has been the rule on tax cases for decades. *Botany Worsted Mills v. U.S.,* 278 U.S. 282, 289-290, 49 S.Ct. 129, 73 L.Ed. 379 (1929); *U.S. v. Janis,* 428 U.S. 433, 440, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976).

faith" requirement, *Dorn's Transportation v. Teamsters Pension Trust Fund of Philadelphia and Vicinity,* 787 F.2d 897, 902 (3d Cir. 1986) which is not implicated ". . . when the seller enters a transaction to escape liability, but the buyer has no intention of taking subsequent actions that will reduce the payments owing to the plan." *Dorn's,* 787 F.2d at 902. The Third Circuit has now gone further to conclude that there is no "error of law," Internal Operating Procedure 6.2.2(d) (3d Cir.), in the arbitrator's conclusion that a mere "good faith expectation," p. 112a, by the donee Bodford that he could continue the business of Hall's against all odds is sufficient to prevent imposition of liability on FedEx—notwithstanding the arbitrator's concession that this interpretation is at odds with the plain language of the statute, p. 107a, n.6. *PBGC v. White Consolidated Industries,* 998 F.2d 1192 (3d Cir. 1993) similarly concluded that the parallel evasion language of 29 U.S.C. § 1369 on single-employer pension plan liability likewise requires proof that the "buyer" of a business had no reasonable chance of success in order to impose liability on the "seller."

In the view of the arbitrator and Third Circuit, Section 1392(c) is limited to "essentially fraudulent maneuvers lacking in economic substance," p. 107a, n.6. See also, *Cuyamaca Meats, Inc. v. San Diego & I.C. Butchers Pension Fund,* 638 F.Supp. 885, 890 (S.D.Cal. 1986) aff'd 827 F.2d 491 (9th Cir. 1987) (same phrase). The transaction will have sufficient "economic substance" to avoid attack as long as the employer articulates "plausible and valid" reasons for a sale after the fact, p. 121a, even though those reasons do not explain the form, price and timing of the actual transaction absent evasion of withdrawal liability.

The simple proposition that a creditor must show the fraudulent intent of a don*ee* to recover from the don*or* is unprecedented and illogical. The gift to Bodford and his active participation in the fraud with knowledge of Tiger's purpose would negate "good faith' 'and allow

recovery from a transferee in the ordinary law of fraud, *U.S. v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1299 (3d Cir. 1986) quoting *The Uniform Fraudulent Conveyance Act in Pennsylvania*, 5 U.Pitt.L.Rev. 161, 186 (1939) ("good faith" defense by recipient for fraudulent conveyance requires proof that the transfer was made for value and "without knowledge" of the fraudulent purpose of the transferor). The "good faith expectation" standard of the Third Circuit goes further to track the standard of *Cheek v. U.S.*, 498 U.S. 192, 202, 111 S.Ct. 604, 611, 112 L.Ed.2d 617 (1991) on "good faith" as a defense to negate willfulness in criminal evasion of income tax based on "a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable" in a civil case.

The Third Circuit's allowance for a *post hoc* articulation of "plausible and valid" reasons for any sale as a defense transforms the statutory language to require proof that evasion of withdrawal liability was *the only* economic reason for a transaction. With the burden of persuasion on intent clearly placed on Tiger by statute, this contradicts the conclusion of *Price Waterhouse v. Hopkins*, 409 U.S. 228, 252, 109 S.Ct. 1775, 1791, 104 L.Ed.2d 268 (1989) that ". . . the employer may not, . . , prevail . . . by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision."

The Seventh Circuit decision in *Santa Fe* emphatically rejected the restrictive approach of the Third Circuit:

> The statutory criterion is not whether the transaction is a sham, having no purpose other than to defeat the goals of the Multi-employer Pension Plan Amendments Act by leaving the other employers in the multiemployer pension plan holding the bag. It is whether the avoidance of withdrawal liability by the seller (not necessarily by the purchaser as well) is

one of the principal purposes of the transaction." *Santa Fe*, 22 F.3d at 729-730.[3]

> The imposition of withdrawal liability in a sale of business situation requires only that a principal purpose of the sale be to escape withdrawal liability. It needn't be the only purpose; it need only have been one of the factors that weighed heavily in the seller's thinking . . ., . . . we would be doing violence to the language and purpose of the statute if we read "a principal" as "the principal." *Santa Fe*, 22 F.3d at 727. See also *American Hospital Association v.* NLRB, 499 U.S. 606, 111 S.Ct. 1539, 113 L.Ed. 2d 675 (1991) (plain meaning of "a" means one of several).
>
> The arbitrator's ". . . opinion, . . ., is devoted to irrelevant questions, such as whether Santa Fe had reasons independent of withdrawal liability to divest itself of SFTT and whether it knew that the purchaser of SFTT was likely to flop. The issue is not whether Santa Fe had compelling reasons independent of withdrawal liability to divest itself of SFTT; that is a given. The issue is the *form* the divestiture took—the sale of stock rather than of assets. *Santa Fe*, 22 F.3d at 729 (emphasis in original).

Under the *Santa Fe* test, Tiger's willingness to accept $1,000 for Hall's as long as Bodford or Lee accepted the withdrawal liability after rejecting prior offers from Bodford and Lee for $10 to $15 Million (subject to due diligence and without assumption of withdrawal liability) is sufficient to establish that withdrawal liability was "a" principal purpose of the transaction.

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[3] The common law of fraud may look to the identity of the buyer as an insider or the knowledge of the donee or "buyer" as evidentiary "badges of fraud" but does not make them necessary elements of a claim against the "seller." See, e.g. *In re: Woodfield*, 978 F.2d 516, 518 (9th Cir. 1992); *Douglas Guardian Warehouses v. Jones*, 405 F.2d 427, 429 (10th Cir. 1969); *Duncan v. First Nat'l Bank of Cartersville, Ga.*, 597 F.2d 51, 56 (5th Cir. 1979) (close relationship between transferor and transferee).

The *Santa Fe* approach is supported by "the general rule that adoption of wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording." *Shannon v. U.S.*, 512 U.S. 573, 114 S.Ct. 2419, 2425, 129 L.Ed.2d 549 (1994) quoting *Carolene Products Company v. U.S.*, 323 U.S. 18, 26, 65 S.Ct. 1, 5, 89 L.Ed. 15 (1944). The parallel language of 26 U.S.C. § 269(a) on civil liability for evasion of income taxes has consistently applied the *Santa Fe* standard. See, *Slappey Drive Industrial Park v. U.S.*, 561 F.2d 572, 586 (5th Cir. 1977) (decision maker for company failed to relate vague contentions, many palpably trivial, to the actual decision and transaction); *Scroll, Inc. v. Comm'r*, 447 F.2d 612, 616-617 (5th Cir. 1971) (taxpayer with burden of proof in 26 U.S.C. § 269 case must show that the non-evasive reasons required the form chosen and not just that they could have justified it as "afterthoughts" or "window dressing"); *Vulcan Materials Co. v. U.S.*, 446 F.2d 690, 699 (5th Cir. 1971) (proof that the actual reason for the merger was alleged concern about the steel industry was required); *Bobsee Corp. v. U.S.*, 411 F.2d 231, 239 (5th Cir. 1969) (uncontradicted reasons did not explain the existence of seven separate corporations); *Southeastern Canteen Co. v. Comm'r*, 410 F.2d 615, 623 (6th Cir. 1969) (transaction invalidated where no reason shown for particular form of transaction other than evasion of taxes); *House Beautiful Homes v. Comm'r*, 405 F.2d 61, 67 (10th Cir. 1968) (principal purpose need not be sole motivation; showing of general non-tax purpose to minimize risk is insufficient defense); *Herculite Protective Fabrics v. Comm'r*, 387 F.2d 475, 475-476 (3d Cir. 1968) (bargain price shows evasion; taxpayer failed to overcome presumption and show a non-evasive purpose under 26 U.S.C. § 269); *Coastal Oil Storage v. Comm'r*, 242 F.2d 396, 397 (4th Cir. 1957) (stated reasons insufficient where separate bookkeeping would have met all stated goals); *Orvis v. Higgins*, 180 F.2d 537, 539 (2d Cir. 1950) (no reason other than

evasion shown to explain life estate trusts); *Beacon Auto Radiator Co., Inc. v. Comm'r,* 52 T.C. 155, 162 (1969) (no connection between transfer and stated reason); *Dillier v. Comm'r,* 41 T.C. 762, 785-788 (1964) aff'd 357 F.2d 647 (9th Cir. 1966) (no stated reasons explained why one corporation was not adequate; partnership form was used for most profitable investment). Neither the Third Circuit nor arbitrator advanced any rationale for a different rule for the same language in 29 U.S.C. § 1392(c).

The factual similarity between Tiger and *Santa Fe* is uncanny with claimed differences smacking of semantics rather than substance. Although "actors in our free enterprise system are not primarily guided by their eleemosynary impulses," *Flying Tiger,* 830 F.2d at 1254, n. 21, Tiger, like Santa Fe, attributed its desire to take $1,000 and a complete loss of investment on its books to concern that the higher yield for an orderly sale or ". . . piecemeal liquidation could not be known for sure in advance . . .," *Santa Fe,* 22 F.3d at 729. Wayne Hoffman, Tiger's chairman, ultimately could explain the gift to Bodford only as a direction from even higher authorities who ordained a "godsend" to free Hall's from Tiger.

Tiger sought to avoid the "gun to its head" of MEPPA liability while *Santa Fe* was only ". . . sort of hit with the two by four about MPAA." *Santa Fe,* 22 F.3d at 728. Tiger and Cronin focused on withdrawal liability ". . . as a real obstacle to doing something with Hall's," while withdrawal liability was only ". . . a major stumbling block in implementing the liquidation . . ." of its SFTT subsidiary to Santa Fe, *Santa Fe,* 22 F.3d at 728. As in *Santa Fe,* Tiger had a subsidiary "whose prospects for a turnaround were not good." *Santa Fe,* 22 F.3d at 728, and initially sought a "large, financially strong purchaser" but then turned to " 'desperation moves,' *Santa Fe,* 22 F.3d at 729, by selling to Bodford for $1,000 even though he was not a "credible buyer" because Tiger had run out

of "reasonable alternatives" to sell Hall's before it collapsed.

The arbitrator's claims, pp. 128a-135a, that he was "not able to attribute . . . smoking gun significance" to the Lafferty memo, p. 130a, and could not find an evasive purpose in the uncontested lender memoranda, repeated references to "MPPA" throughout negotiations and the testimony of every disinterested witness that withdrawal liability drove the sale of Hall's are not findings of fact to which a court should defer. See, *Orvis v. Higgins,* 180 F.2d at 539 citing *U.S. v. Yellow Cab Co.*, 338 U.S. 338, 70 S.Ct. 177, 94 L.Ed. 150 (1949) (court reviews documentary evidence and uncontested matters for application of law in tax evasion case without deference to trial court). As in *Santa Fe,* they are simply "an inference from the testimony (and other evidence) not the testimony itself" and furnish no basis to ignore uncontested and "[i]nternal documents that cannot be explained away [which] make clear that . . . management was both aware of the company's potential withdrawal liability . . . and aware that a sale of the company might avoid it." *Santa Fe,* 22 F.3d at 728, 729.

II. THE ISSUES PRESENTED ARE IMPORTANT TO PREVENT DUMPING OF UNFUNDED PENSION LIABILITY IN THE BILLIONS ON OTHER EMPLOYERS AND THE FEDERAL GOVERNMENT

With evisceration of the prohibitions on evasion of pension liability by the Third Circuit, any Delaware corporation with the money to write "sale" papers and file suit can follow Tiger's declaratory judgment route (from its base in Los Angeles) into Delaware to obtain judicial immunity against future actions by PBGC or pension plans. This places the public at risk on more than $80 Billion of unfunded pension liability insured by PBGC, *PBGC Release 97-09 (Pension Underfunding and Top 50 List)* (estimated $64 Billion in unfunded pension

liabilities for single employer plans); 1996 Green Book, § 15 (Pension Benefit Guaranty Corporation) (multiemployer plan exposure of $20 Billion in 1993). The multiemployer plan exposure and the $20 Billion in pension debt of companies with bond ratings below investment grade, PBGC Release 97-09, is most directly affected.

The Third Circuit is separately home to a disproportionate share of plans with significant unfunded liabilities which pose a real risk to the public fisc. The $180,561,694 in unfunded liabilities for the Teamsters Pension Trust Fund of Philadelphia & Vicinity is open game as the decision below makes it impossible to pursue prior control group members in the Third Circuit. The Third Circuit also covers many of the most underfunded single-employer pension plans in the country including LTV Corporation ($1.444 Billion), see *PBGC v. LTV Corp.*, 496 U.S. 633, 110 S.Ct. 2668, 110 L.Ed. 2d 579 (1990) (restoring $2.1 Billion in pension debt for LTV Steel); Westinghouse Electric Co. ($2.843 Billion); Bethlehem Steel ($2.222 Billion); Inland Steel ($612 Million); Armco, Inc. ($587 Million); Unisys ($505 Million); US Air ($458 Million); Natural Steel ($458 Million); Crown Cork & Seal, Inc. ($396 Million) and Mack Trucks ($332 Million. With no teeth in the "evade or avoid" prohibitions of 29 U.S.C. §§ 1369, 1392(c), the business incentive to shed pension debt, in whole or in part, through sales of failing businesses to weak buyers for nominal sums and closing costs will be virtually irresistible.

The Third Circuit precluded any claim against prior control group members in rejecting the Fund's partnership approach to control group changes which should have been enforced under § 405 of MPPAA, P.L. 96-364, 29 U.S.C.A. § 1461 note (uncodified). To paraphrase *Central States, S.E. & S.W.A. Pension Fund v. Robinson Cartage*, 55 F.3d 1318, 1323 (7th Cir. 1995), "[t]he simple use of the present tense in [29 U.S.C. § 1381(a)]

is not enough to indicate which time period should be used . . . [to] yield a logical result" in identifying the "employer" who is responsible for withdrawal liability. 29 U.S.C. § 1398, 1362(d) (1976) do however treat both groups emerging from a "division" of the control group "employer"—such as the sale of Hall's—as the "original employer." [4]

The Fund thus concluded that Tiger, as well as Hall's, remained jointly and severally liable for the unamortized balance of withdrawal liability which accrued during their affiliation based on analogous rules for annualized income tax liability [5] and partnership dissolution concepts. See, 26 C.F.R. §§ 1.1502-6(b), 1.1502-77(b) (1980) (termination of common control does not relieve an affiliate of joint and several liability for income tax which arose during affiliation); Crane & Bromberg, *The Law of Partnership*, pp. 444, 447 (1968) (departure of a *partner* "dissolves" the partnership [in MPPAA and tax: causes the control group "employer" to "cease to exist"] but the departing partner remains liable for debt incurred before the dissolution until it is paid in full). The Third Circuit's rejection of this view conflicts with the conclusion of *Trustees of Amalgamated Insurance Fund v. McFarlin's*, 789 F.2d 98, 103 (2d Cir. 1986) that "withdrawal liability represents an employer's accelerated con-

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[4] The statute has been amended but its 1976 version is applicable to this matter, *Flying Tiger*, 830 F.2d at 1253-1254 & n.20.

[5] Control group liability for unfunded pension debt balances the favorable tax treatment of contributions under 26 U.S.C. § 404 which is available to any member of a controlled group of corporations under 26 U.S.C. §§ 1501-1504 to assure that the debt underlying the deduction actually is paid. C.F., *Comm'r v. Tufts*, 461 U.S. 300, 103 S.Ct. 1826, 1830 n.4, 1833-4, 75 L.Ed.2d 863 (1983) (imputed income on forgiveness of loan justifying prior interest deduction is logical even if the overall transaction is "ruinous" as a result); *In Re: Juvenile Shoe Corp. of America*, 99 F.3d 898, 901 (8th Cir. 1996) (reversion tax of 26 U.S.C. § 4980 is a reasonable counterbalance to correct lost income tax).

tribution of funds needed to finance employees' pension rights . . . which have not been fully funded . . ." and does not simply spring out of nowhere at the pinpoint of withdrawal. The disagreement on this point affects the national economy on the bankruptcy priority issues of *McFarlin's* and assures the dumping of billions of dollars in pension liability.

CONCLUSION

The Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 96-7050

THE FLYING TIGER LINE, INC., a Delaware corporation; TIGER INTERNATIONAL, INC., a Delaware corporation; WARREN TRANSPORT, INC., an Iowa corporation;

v.

CENTRAL STATES, SOUTHWEST AND SOUTHEAST AREAS PENSION FUND, a multiemployer pension plan; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, a multiemployer pension fund; WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND, a multiemployer pension plan; TEAMSTERS LOCAL 641 PENSION FUND, a multiemployer pension plan; TRUCKING EMPLOYEES OF NORTH JERSEY WELFARE FUND, a multiemployer pension plan; CENTRAL PENNSYLVANIA TEAMSTERS PENSION FUND, a multiemployer pension plan, each sued individually and as a member of a class of similarly situated multiemployer pension plans who assert withdrawal liability, against Hall's Motor Transit Company, Under the Multiemployer Pension Plan Amendments Act of 1980

(D.C. No. 86-cv-00304)

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; CHARLES J. SCHAFFER, JR., its administrator and fiduciary

v.

FEDERAL EXPRESS CORPORATION;
THE FLYING TIGER LINES, INC.;
WARREN TRANSPORT, INC.;
TIGER INTERNATIONAL

(D.C. No. 94-cv-00017)

FEDERAL EXPRESS CORPORATION;
THE FLYING TIGER LINE, INC.;
WARREN TRANSPORT, INC.;
TIGER INTERNATIONAL

v.

TEAMSTERS PENSON TRUST FUND OF PHILADELPHIA AND VICINITY; THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; CHARLES J. SCHAFFER, JR.

(D.C. No. 94-cv-00033)

FEDERAL EXPRESS CORPORATION;
THE FLYING TIGER LINES, INC.;
WARREN TRANSPORT, INC.;
TIGER INTERNATIONAL

v.

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA; CHARLES J. SCHAFFER, JR., its administrator

(D.C. No. 94-cv-00112)

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; CHARLES J. SCHAFFER, JR., its administrator and fiduciary

v.

FEDERAL EXPRESS CORPORATION;
THE FLYING TIGER LINES, INC.;
WARREN TRANSPORT, INC.;
TIGER INTERNATIONAL

(D.C. No. 94-cv-00130)

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; CHARLES J. SCHAFFER, JR., its administrator and fiduciary,
Appellants

Appeal from the United States District Court
for the District of Delaware

(D.C. Civil No. 86-00304)
District Judge: Honorable Sue L. Robinson

ARGUED August 7, 1996

BEFORE: NYGAARD, LEWIS and MCKEE, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by the appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered on December 27, 1995, be and is hereby AFFIRMED, essentially for the reasons set forth in the district court's opinion.

Costs taxed against the appellants.

BY THE COURT:

/s/ [Illegible]
Circuit Judge

Attest:

/s/ [Illegible]
Chief Deputy Clerk

Dated: August 20, 1996

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 86-304; 94-017; 94-033;
94-112; and 94-130-SLR

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, and CHARLES J. SCHAFFER, JR., its administrator and fiduciary,

Plaintiffs,

v.

FEDERAL EXPRESS CORPORATION, THE FLYING TIGER LINES, INC., WARREN TRANSPORT, INC., and TIGER INTERNATIONAL, INC.,

Defendants,

and

FEDERAL EXPRESS CORPORATION, THE FLYING TIGER LINE, INC., WARREN TRANSPORT, INC., and TIGER INTERNATIONAL, INC.,

Plaintiffs,

v.

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, and CHARLES J. SCHAFFER, JR., its administrator,

Defendants.

Dated: December 27, 1995

Wilmington, Delaware

MEMORANDUM OPINION

ROBINSON, District Judge

I. INTRODUCTION

This litigation is the latest chapter in a case that has lingered for nearly ten years. The dispute arose from the bankruptcy of Hall's Motor Transit Company, Inc. ("Hall's") in March 1986, and the company's resulting withdrawal from the Teamsters Pension Trust Fund of Philadelphia and Vicinity ("the Philadelphia Fund"). Between 1980 and 1985, Hall's was a fully owned subsidiary of Tiger International, Inc. ("Tiger"). In January 1985, Tiger sold 75% of Hall's shares to a management buyout group, Hall's Acquisition Corporation ("HAC"), and later transferred its remaining 25% interest as well. After Hall's declared bankruptcy in 1986, the trustees of several pension plans to which Hall's had been contributing assessed withdrawal liability against Tiger. In response, Tiger filed suit seeking a declaration that it was not responsible for Hall's withdrawal liability. Tiger eventually settled with all of the funds except the Philadelphia Fund, and the remaining dispute was ordered into arbitration by the Third Circuit. *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia & Vicinity*, 830 F.2d 1241 (3d Cir. 1987).

The Philadelphia Fund now brings this suit pursuant to 29 U.S.C. § 1401(b)(2) to vacate the arbitrator's decision finding no withdrawal liability on the part of Tiger. Tiger has moved to enforce the arbitrator's award. Because the court finds no clear error in the arbitrator's conclusions of fact and no error of law, Tiger's motion to enforce the award will be granted, and the Philadelphia Fund's motion to vacate will be denied.

II. BACKGROUND

The facts as set out in the Arbitrator's Findings, Opinion and Award (D.I. 254 at 6131 *et seq.*) are as follows: [1]

Tiger was a transportation services holding company whose subsidiaries included Flying Tiger Lines, Inc. ("Flying Tiger"), a cargo airline; North American Car Corpoartion ("North American"), a rail car leasing company; Tiger Air, Inc. ("Tiger Air"), which sold and leased aircraft and provided aviation services; and several other companies in the fields of computer and equipment leasing, aircraft charter and leasing, and mortgage insurance. Between 1979 and 1981, Tiger acquired three trucking companies, including Hall's. (D.I. 254 at 6140-41)

During the first year of Tiger's ownership, Hall's reported net gains and was a substantial cash source for Tiger. Beginning in 1981, however, Hall's began to feel the effects of the recession, deregulation, and other changes in the trucking industry. (D.I. 254 at 6142) At the same time, Tiger and its other subsidiaries were also facing a fiscal crises. In February 1983, Flying Tiger, North American, anud other Tiger subsidiaries declared a moratorium on debt payments and invited their lenders to restructure their outstanding loans. (D.I. 254 at 6143)

The resulting agreements led to the gradual dismantling of Tiger Air and North American, and strict limitations on the amounts and purposes of cash advances from the subsidiaries to Tiger. These conditions limited Tiger's overall cash flow and prevented Tiger from channeling funds from a healthy subsidiary to a troubled one, such as Hall's. (D.I. 254 at 6144-46) The restructuring also produced the "Override Agreement," which set out the events that would cause immediate default on Flying Tiger's loans. One of the events that would trigger de-

[1] Although the parties disagree on the inferences to be drawn from the facts, the basic sequence of events is undisputed.

fault was "Aggregate Plan Liability" in excess of $5 million. Aggregate liability was to be determined by adding a) unpaid liability resulting from the terminaton of any single employer pension plan by Tiger or any of its subsidaries; b) withdrawal liability assessed by the trustees of any multiemployer pension plan against a Tiger-affiliated company; and c) unpaid delinquent pension contributions owed by any Tiger-affiliated company. (Override Agreement, D.I. 262 at 68-384, Supplemental Joint Appendix)

Meanwhile, the financial situation at Hall's worsened. The company had reported operating losses for three years in a row and its net worth was steadily declining. Hall's auditors gave qualified opinions in 1982 and 1983, based substantially on the poor financial health of its parent company, Tiger. (D.I. 254 at 6146) James Cronin, who had participated in management and planning at other Tiger subsidiaries, was asked to evaluate Hall's in early 1984. By mid-year he was appointed Hall's president. Cronin believed that Hall's could be turned around, but only if the company could negotiate wage concessions in exchange for an Employee Stock Option Plan ("ESOP").

By the end of 1984, it was clear that Hall's would need an infusion of capital to survive. The company was already carrying approximately $12 million in debt, secured by liens on its rolling stock, and the existing lenders appeared unwilling to lend any more. (D.I. 254 at 6143) Tiger's own poor financial condition and the restrictions imposed upon it by the restructuring agreements limited its ability to contribute the needed capital. Labor costs were soaring, but Hall's had not yet been able to secure a wage cut in return for the implementation of an ESOP. Cronin and others in the organization believed that Tiger's ownership of Hall's played a significant role in the union's refusal to accept wage concessions. Cronin also discovered that Hall's competitors were using Tiger's well-publicized financial troubles to lure away customers

concerned about having their goods abandoned or tied up in bankruptcy proceedings. (D.I. 254 at 6149)

In November 1984, Cronin engaged Alex, Brown & Sons to find a purchaser for Hall's. (D.I. 254 at 6150) Several prospective buyers responded to the selling memorandum, and on December 12, 1984, Tiger representatives met with one of the respondents, Whit Lee. Lee offered $10 to $15 million for Hall's stock, and proposed that Hall's $12 million intercompany debt to Tiger be forgiven. After learning that Tiger wished to close the transaction before December 31, 1984, Lee revised his proposal. He offered only $1,000 in cash, but would leave $10.5 million of the intercompany debt in place. Alvin Bodford, Hall's chief financial officer, then proposed a management buyout of the company on the same terms that Lee had offered. Hall's lenders preferred Bodford to Lee as a purchaser, so Tiger discontinued negotiations with the latter. (D.I. 254 at 6150-55)

According to the terms of the resulting agreement, which Tiger's board approved on December 31, 1984, Tiger sold 75% of Hall's shares to HAC, which Bodford had formed for the purpose of the sale. Tiger retained the remaining 25% of Hall's stock and reserved the right to name a director to Hall's board.[2] Tiger also paid the closing costs, which amounted to approximately $1 million. In return, HAC paid $1,000 in cash and gave Tiger a note for $10.5 million, secured by Hall's real estate but junior to the secured rights of Hall's outside lenders. The agreement required HAC to continue contributions to the pension plans at the pre-sale level. Hall's lenders also participated in the agreement, promising $5 million in new capital in exchange for first liens on all unencumbered real estate and rolling stock. (D.I. 254 at 6156-57)

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[2] Tiger never exercised this right.

Under HAC's ownership, Hall's downward spiral accelerated. Within a few months of the sale, a substantial part of the management team and the turnaround specialist hired at the lenders' urging had departed, citing "differences in management philosophies." (D.I. 254 at 6161) Hall's operating revenues dropped from $190 million to $160 million, and its market share declined 25% over the course of 1985. (D.I. 254 at 6161)

In November 1985, Bodford approached Tiger and demanded that Tiger relinquish both its remaining 25% interest in Hall's and its $10.5 million note. Tiger initially refused. Bodford then threatened to redeem HAC's 75% stake in Hall's. He pointed out that by doing so he would force Tiger to resume full ownership of Hall's, and full liability for pension fund withdrawal if Hall's should fail. (D.I. 254 at 6162) Realizing that Hall's demise was at that point likely, Tiger acceded to Bodford's demands. (D.I. 254 at 6162)

Hall's filed for bankruptcy under Chapter 11 on March 10, 1986. By the end of 1987, it had ceased all contributions to the pension funds to which it had assumed obligations. (D.I. 254 at 6163)

III. DISCUSSION

A. Standard of Review

In reviewing the findings of fact of an arbitrator in the context at bar, "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401(c). The "clear preponderance" language of the statute has been used interchangeably with "clear error." *See, e.g., Santa Fe Pacific Corp. v. Central States, Southeast & Southwest Areas Pension Fund*, 22 F.3d 725 (7th Cir.), *cert. denied*, 115 S. Ct. 483 (1994). "A finding is clearly erroneous if the reveiwing court, after

duly acknowledging the superior proximity of the factfinder to the witnesses is firmly convinced that the finding is erroneous." *Santa Fe*, 22 F.3d at 727, *citing Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2279-80 (1993). The arbitrator's legal conclusions are reviewed *de novo*. *Crown Cork & Seal Co. v. Central States Southeast & Southwest Areas Pension Fund*, 982 F.2d 857, 860 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2961 (1993).

B. Evade or Avoid Liability

The arbitrator found that Tiger is not liable for the unfunded vested pension obligations of Hall's because evading such liability was not a principal purpose of the sale of Hall's. The Philadelphia Fund raises three challenges to the arbitrator's conclusions on this issue. First, the Fund contends that the arbitrator erred as a matter of law by not applying the correct presumptions to the determination of the plan sponsor. Second, the arbitrator erred as a matter of law by focusing on whether Tiger had any other plausible reasons for selling Hall's, rather than on whether avoiding withdrawal liability was a principal purpose of the transaction. Finally, the Fund argues that the arbitrator's factual conclusions are clearly erroneous.

1. The Statutory Scheme

Under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), which amended the Employee Retirement Income Security Act ("ERISA"), participating employers contribute to a common fund for employee pensions. Each employer contributes in amounts determined through the collective bargaining process. The pension plan is administered by trustees, half of whom are selected by the employers and half selected by the union. To protect the other employers as well as the pensions themselves, the MPPAA imposes liability for

unfunded benefits on an employer who withdraws from a plan. The statute defines withdrawal as occurring "when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1381. The MPPAA provides several exceptions to the imposition of liability upon withdrawal from a plan, including § 1398, which provides that liability shall not be imposed in the case of a mere change in corporate structure which does not interrupt the employer's contributions.

The MPPAA also sets out a crucial exception to the exceptions, providing that "[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction." 29 U.S.C. § 1392(c). Therefore, if the sale of Hall's was undertaken principally to avoid MPPAA liability, withdrawal liability would properly be assessed against Tiger as if it had never sold Hall's to the Bedford management group.

2. Deference to the Plan Sponsor's Conclusions

ERISA requires arbitrators to accord deference to the factual determinations and accounting assumptions of the plan sponsor. 29 U.S.C. § 1401(a)(3). This section states that an arbitrator shall presume correct any determination made by a plan sponsor "unless the party contesting the determination shows by a preponderance of evidence that the determination was unreasonable or clearly erroneous." As interpreted by the Supreme Court in *Concrete Pipe*, this section "plac[es] the burden of persuasion as to historical fact on the employer." *Concrete Pipe*, 113 S. Ct. at 2282. The employer has the burden of disproving the plan sponsor's conclusions by a preponderance of evidence . *Id.* at 2283.

The Philadelphia Fund contends that the arbitrator erred as a matter of law in deciding that evading withdrawal liability was not a primary purpose of the sale of Hall's. It is a question of law, the Fund maintains, because the arbitrator failed to apply the presumption of correctness required by 29 U.S.C. § 1401(a)(3). To support this claim, however, the Fund simply argues its version of the facts. The essence of this argument is that the arbitrator must have applied the wrong standard because he reached the "wrong" conclusion. This court finds that the arbitrator did correctly articulate the presumption and burden of proof, and there is no indication that he did not fully understand and apply them in this case. Therefore, the court concludes that the arbitrator did not err as a matter of law by failing to apply, or by incorrectly applying, the presumption of correctness required by § 1401(a)(3).

3. The Statutory Standard

The Philadelphia Fund contends that the arbitrator erred as a matter of law by incorrectly interpreting § 1392(c). This section provides that where a primary purpose of a transaction is evasion or avoidance of withdrawal liability, that transaction shall be disregarded when assessing such liability. According to the Philadelphia Fund, the arbitrator considered only whether Tiger had any legitimate reasons to sell Hall's. This analysis was erroneous, the Fund maintains, because the statute requires only that evasion be *a* primary purpose for the transaction, not *the* primary purpose.

In deciding this issue, the arbitrator correctly relied on *Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund of Philadelphia & Vicinity*, 787 F.2d 897 (3d Cir. 1986).[3] The facts of *Dorn's* are similar to the present

[3] The arbitrator also noted that this provision has not been widely applied, and has usually been construed narrowly. *See, e.g., Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers'*

case. In *Dorn's*, a trucking business was sold to a company that had identical collective bargaining agreements with the union pension plan. The buyer company continued contributions until it went bankrupt. The pension fund attempted to assess withdrawal liability against the seller, claiming that the sale was made for the purpose of avoiding liability. The court held that the seller was not liable under § 1392, because "when the seller enters a transaction to escape liability, but the buyer has no intention of taking subsequent actions that will reduce the payments owing to the Plan, it does not appear that a 'principal purpose of the transaction' as a whole is to escape liability." *Dorn's*, 787 F.2d at 902.

The court in *Dorn's* was able to decide the issue of evade or avoid liability as a matter of law because there was no evidence that the buyer even knew of the seller's potential withdrawal liability. Therefore, in the absence of a material fact issue, the court could decide the issue without sending the case to arbitration. *Id.* at 902-03.[4] In this case, in contrast, there were disputed issues of material fact, and there is evidence to support either inference on the issue of the buyer's intent. The arbitrator found as a factual matter that HAC did not have any intent to aid Tiger in avoiding withdrawal liability. He concluded that the evidence, rather than supporting the inference of collusion, indicated a confrontational relationship between Bodford and Tiger's management. Alternatively, recognizing that the Philadelphia Fund main-

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& Food Employers' Pension Trust Fund, 827 F.2d 491 (9th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988) (an employer's attempt to minimize the amount of withdrawal liability did not constitute an attempt to evade or avoid under § 1392(c)).

[4] The Philadelphia Fund argues that *Dorn's* is inapplicable to this case because the Third Circuit subsequently limited the holding to the facts of that case. The Third Circuit did limit *Dorn's* to its particular factual circumstances, but only on the issue of when an ERISA dispute may avoid arbitration. *Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241 (3d Cir. 1987).

tained that *Dorn's* did not apply, the arbitrator made a specific factual finding that evading withdrawal liability was not a primary purpose of the transaction for either party. The issue of evade or avoid liability, therefore, was decided as an issue of fact by the arbitrator and should be reviewed by this court for clear error.

4. The Arbitrator's Factual Findings

The Philadelphia Fund argues that the overwhelming weight of the evidence points to an intent to evade withdrawal liability. Specifically, the Fund argues that such intent is reflected by the low purchase price, the large amount of liability that Tiger was facing, the likelihood that Hall's would fail, Tiger's willingness to give Bodford its remaining 25% stake in Hall's, and what the Fund argues was a collusive relationship between Bodford and Tiger's management. In addition, the Fund focuses on several "smoking guns," which it contends establish both awareness of the potential MPPAA liability and an intent to avoid liability through the sale of Hall's. (*See* D.I. 254 at 6171-73)

To support its factual arguments, the Philadelphia Fund relies heavily on *Santa Fe Pacific Corp. v. Central States, Southeast & Southwest Areas Pension Fund*, 22 F.3d 725 (7th Cir. 1994). In *Santa Fe*, as in this case, there were two possible means of disposing of a troubled trucking subsidiary. One was an asset sale; the other, a sale of stock. In both *Santa Fe* and this case, the evidence established that an asset sale would have been more profitable to the parent company but for the potential withdrawal liability.[5] In *Santa Fe*, the arbitrator made

[5] An asset sale does not fall under the change in corporate structure exception of § 1398. It is governed instead by 29 U.S.C. § 1384, which requires the seller to post a bond or escrow for all current withdrawal liability plus one year's contributions. More significantly, the section imposes secondary withdrawal liability on the seller if the buyer withdraws from the plan within five years of the sale.

no findings on other possible reasons for the sale structure chosen, and apparently ignored or discounted documents which left no room for doubt that the company was aware of the withdrawal liability issue and had even considered " 'desperation moves,' including 'selling [the subsidiary] to someone in trouble.' " *Id.* at 729. The appellate court found the "arbitrator's treatment of these issues [to be] entirely inadequate" and concluded, contrary to the arbitrator, that a principal purpose for the sale was to avoid withdrawal liability. *Id.*[6]

In contrast, the arbitrator in this case made explicit findings on each one of the Fund's contentions. He concluded that although the asset sale might have turned out to have netted more for Tiger, there were other plausible reasons for structuring the transaction as a sale of stock, most importantly the belief that Hall's could eventually be turned around as a going concern under new management. This conclusion was bolstered by the fact that Tiger retained a 25% interest in Hall's. "[A]s long as Hall's was losing money," the arbitrator reasoned, "Tiger, as 100% owner, had no prospect either of collecting on its [$12 million intercompany] debt or receiving profits. If, however, . . . Hall's had more favorable prospects for returning to profitability under other ownership, then the potential return to Tiger from the sale obviously far exceeded Bodford's $1,000." (D.I. 254 at 6205) The arbitrator also found specific support for this conclusion in the apparently widespread belief that a non-Tiger controlled Hall's had a better chance of negotiating wage concessions in exchange for an ESOP, and thus returning Hall's to profitability.

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[6] The Fund also urges this court to adopt the *Santa Fe* court's legal ruling that a finding of evade or avoid liability depends entirely on the seller's motives. Significantly, this ruling is not controlling law in this circuit. Rather, this court must accept the interpretation set out in *Dorn's*, that escaping withdrawal liability can only be a primary purpose of the transaction as a whole where both buyer and seller have that intent.

As for the "smoking guns," the arbitrator found that although Tiger, HAC, Whit Lee, and others involved in the deal all seemed to be aware of MPPAA liability, there was nothing to connect that awareness to an evasive intent. He could find "nothing sinister about a business manager being aware that certain actions—such as downsizing portions of the operation—might trigger withdrawal liability, or that potential purchasers might have some reluctance about acquiring a company which is subject to such a contingent liability." (D.I. 254 at 6203) The court agrees with this conclusion, and again finds this case distinguishable from *Santa Fe*. None of the documents pointed to by the Fund makes an explicit statement of the type found in *Santa Fe* that the potential liability might lead to "selling to someone in trouble."

The Fund also focused on the timing of the sale as evidence that Tiger's true reason for selling was avoidance of MPPAA liability. It points out that Tiger was planning a public offering of preferred stock in early 1985, and that by selling Hall's before the end of the year, the subsidiary's potential withdrawal liability, and its triggering effect under the Override Agreement, did not have to appear in the registration statement. In so arguing, the Fund appears to equate avoidance of reporting potential withdrawal liability with avoidance of the liability itself. Only the latter is sanctioned by § 1392. Furthermore, the arbitrator addressed the Fund's contentions and concluded that the sale was timed so as to enable Tiger to report that it had disposed of an unprofitable subsidiary. The arbitrator noted that even after the sale, Tiger's registration statement included Hall's potential withdrawal liability as if it were still Tiger's. The registration statement also contained no mention of the other default-triggering events covered in the Override Agreement. The arbitrator concluded that he was "unable to read this evidence as establishing that Tiger was attempting to avoid a further disclosure—the relationship between the Override Agreement and with-

drawal liability—that all of the other evidence indicates that Tiger was very unlikely to have considered providing in any event." (D.I. 254 at 6197-6202) The Fund has not met its burden of showing that this conclusion is erroneous.

With respect to Tiger's transfer of its retained 25% interest to Bodford a year after the sale, the arbitrator noted that Bodford specifically threatened Tiger with the redemption of his 75% interest, which would make Tiger the sole owner of a company whose fortunes had taken a dramatic turn for the worse.[7] He concluded that "[t]he fact that Tiger so acted 'because of [MPPAA]' . . . does not, as the Fund suggests, demonstrate that Tiger had acted for the same reason a year earlier when it made the original transfer to HAC." (D.I. 254 at 6209) The court agrees with this assessment. Bodford's letter threatening to redeem his interest in Hall's does not support a finding that the initial sale was made for the purpose of evading liability. (Exhibit 326, Joint Appendix at 3425-26) In addition, the acrimonious tone of the correspondence belies any inference of collusion.

The court, therefore, is not convinced that the arbitrator erred in his finding that the sale of Hall's was not undertaken to evade or avoid MPPAA liability.

C. Accrual Liability

The Philadelphia Fund has set forth an alternative theory of recovery, that of accrual liability. According to this theory, even after a subsidiary is sold, the parent company (or any member of the controlled group as defined by 29 U.S.C. § 1301(b)) remains liable for the "debt" to the pension fund accrued up to the year of the sale, until such debt is fully amortized. The arbitrator, relying on a number of cases in which the theory had been

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[7] MPPAA imposes liability, by reference to the Internal Revenue Code, on owners of at least 80% of the corporation's stock. 29 U.S.C. § 1301; I.R.C. § 1563(e)(1).

rejected in similar contexts, refused to impose withdrawal liability on Tiger based on the accrual theory. (D.I. 254 at 6210-17) Because the accrual theory is an issue of law, the court will review the arbitrator's decision *de novo*.

ERISA provides that "all employees of trades or businesses . . . which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer." 29 U.S.C. § 1301(b). Section 1398 provides that in the case of a change in corporate structure, "a successor or parent corporation or any other entity resulting from any such change shall be considered the original employer." The Philadelphia Fund contends that when a controlled group splits up, as in the sale of a subsidiary, all of the original members of the group remain "original employers," and each, therefore, retains a contingent liability for the withdrawal of any of the other members. The original members are responsible for the amount of the withdrawal liability that was "accrued" up to the time the group split up.

As noted by the arbitrator, several courts have analyzed and rejected the accrual liability theory. *Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Central Michigan Trucking, Inc.*, 857 F.2d 1107, 1109-10 (6th Cir. 1988); *Godchaux v. Conveying Techniques, Inc.*, 846 F.2d 306 (5th Cir. 1988); *Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Headley's Express & Storage Co.*, 1993 WL 18933 (E.D. Pa. June 3, 1993). These cases reveal two flaws in the accrual liability theory. The first concerns the Fund's definition of the employer; the second involves the Fund's determination of when withdrawal liability arises.

The Fund bases its interpretation of who is liable for the withdrawal of a former member of a controlled group in part on analogy to certain provisions of the Internal Revenue Code and corresponding regulations concerning

controlled groups. 26 U.S.C. § 414(c); 26 C.F.R. §§ 1.1502-6(b), 1.1502-77(b). However, as the Sixth Circuit noted in *Central Michigan Trucking*, 857 F.2d at 1111 (6th Cir. 1988), the cited Internal Revenue Code provisions are not among those explicitly incorporated into the ERISA/MPPAA statute. "Absent such an express provision, tax precepts governing successorship are not dispositive of the meaning of MPPAA's successorship provision." *Id.* The Fund's theory also does not fit the plain meaning of § 1398:

> Terming the spun-off company as the "original employer" clearly shows that under MPPAA the new employment entity will be deemed the original employer, consequently only that employer and any control group to which it belongs at the time of withdrawal will be responsible for withdrawal liability.

Id. at 1109. The Sixth Circuit noted further that neither the statutory scheme of MPPAA nor the legislative history supports the Fund's definition of "original employer." Rather, when a subsidiary is sold, the control group as a single employer ceases to exist. The spun-off company, and any new control group of which it becomes a part, becomes the "original employer" and is solely responsible for any withdrawal by the spun-off company. *Id.* at 1109-10.

The accrual theory is also flawed in its interpretation of when liability for withdrawal arises. The Fund argues that liability accrues over time, before actual withdrawal, whenever the plan to which an employer contributes develops unfunded vested liabilities. The section of MPPAA that defines withdrawal liability, however, does not support this reading: "If an employer withdrawals from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability." 29 U.S.C. § 1381(a). *See Godchaux*, 846 F.2d at 310. In addition, a plan's unfunded vested liability can

vary greatly from year to year, depending on factors such as how well the plan is managed or changes in benefits. *Id.* at 311. It is not something that accrues steadily, nor is it a fixed amount that can be amortized over time.

The court, therefore, adopts the analysis of the Fifth and Sixth Circuits, and concludes that the accrual liability theory is invalid under ERISA/MPPAA.

IV. CONCLUSION

For the reasons stated above, the court concludes that the arbitrator did not err in his legal or factual determinations. The motion to enforce the arbitrator's award, therefore, will be granted, and the motion to vacate will be denied. An order consistent with this memorandum opinion will issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 86-304; 94-017; 94-033;
94-112; and 94-130-SLR

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, and CHARLES J. SCHAFFER, JR., its administrator and fiduciary,

Plaintiffs,

v.

FEDERAL EXPRESS CORPORATION, THE FLYING TIGER LINES, INC., WARREN TRANSPORT, INC., and TIGER INTERNATIONAL, INC.,

Defendants,

and

FEDERAL EXPRESS CORPORATION, THE FLYING TIGER LINE, INC., WARREN TRANSPORT, INC., and TIGER INTERNATIONAL, INC.,

Plaintiffs,

v.

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, and CHARLES J. SCHAFFER, JR., its administrator and fiduciary,

Defendants.

ORDER

At Wilmington this 27th day of December, 1995, consistent with the memorandum opinion issued this same date;

IT IS ORDERED that the motions by Flying Tiger Line *et al.* to enforce the arbitrator's award (D.I. 229, 232) are granted, and the motions by the Teamsters Pension Trust Fund to vacate or modify the arbitrator's award and order, and to stay proceedings pending review (D.I. 225, 226, 234) are denied. The motion by Federal Express Corp. *et al.* for leave to file a surreply brief (D.I. 266) is granted.

/s/ Sue L. Robinson
SUE L. ROBINSON
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-7050

THE FLYING TIGER LINE, INC., a Delaware corporation; TIGER INTERNATIONAL, INC., a Delaware corporation; WARREN TRANSPORT, INC., an Iowa corporation;

vs.

CENTRAL STATES, SOUTHWEST AND SOUTHEAST AREAS PENSION FUND, a multiemployer pension plan; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY, a multiemployer pension fund; WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND, a multiemployer pension plan; TEAMSTERS LOCAL 641 PENSION FUND, a multiemployer pension plan; TRUCKING EMPLOYEES OF NORTH JERSEY WELFARE FUND, a multiemployer pension plan; CENTRAL PENNSYLVANIA TEAMSTERS PENSION FUND, a multiemployer pension plan, each sued individually and as a member of a class of similarly situated multiemployer pension plans who assert withdrawal liability, against Hall's Motor Transit Company, Under the Multiemployer Pension Plan Amendments Act of 1980

(D.C. No. 86-cv-00304)

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; THE TRUSTEES OF TEAMSTERS PENSION

TRUST FUND OF PHILADELPHIA AND VICINITY; CHARLES J. SCHAFFER, JR., its administrator and fiduciary

vs.

FEDERAL EXPRESS CORPORATION; THE FLYING TIGER LINES, INC.; WARREN TRANSPORT, INC.; TIGER INTERNATIONAL

D.C. No. 94-cv-00017)

FEDERAL EXPRESS CORPORATION; THE FLYING TIGER LINE, INC.; WARREN TRANSPORT, INC.; TIGER INTERNATIONAL

vs.

TEAMSTERS PENSON TRUST FUND OF PHILADELPHIA AND VICINITY; THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; CHARLES J. SCHAFFER, JR.

(D.C. No. 94-cv-00033)

FEDERAL EXPRESS CORPORATION; THE FLYING TIGER LINES, INC.; WARREN TRANSPORT, INC.; TIGER INTERNATIONAL

vs.

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA; CHARLES J. SCHAFFER, JR., its administrator

(D.C. No. 94-cv-00112)

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; CHARLES J. SCHAFFER, JR., its administrator and fiduciary

vs.

FEDERAL EXPRESS CORPORATION; THE FLYING TIGER LINES, INC.; WARREN TRANSPORT, INC.; TIGER INTERNATIONAL

(D.C. No. 94-cv-00130)

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; CHARLES J. SCHAFFER, JR., its Administrator and fiduciary,

Appellants

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and McKEE, *Circuit Judges.*

The petition for rehearing filed by the appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Timothy K. Lewis
TIMOTHY K. LEWIS
Circuit Judge

Date: Oct. 21, 1996

APPENDIX D

[Logo]

TEAMSTERS PENSION TRUST FUND
OF PHILADELPHIA AND VICINITY
of Philadelphia and Vicinity
Fourth and Cherry Streets
Philadelphia, Pennsylvania 19106
Walnut 3-6300

January 20, 1988

Flying Tiger Line, Inc.
7401 World Way West
Los Angeles, CA 90009

RE: Withdrawal Liability
Contributing Business: Hall's
Motor Transit Company

Gentlemen:

We have determined that the employer(s) including Hall's Motor Transit Company effected a complete withdrawal from the Teamsters Pension Trust Fund of Philadelphia and Vicinity (the Fund) during the 1987 Plan Year by permanently ceasing covered operations. As required under the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the Act), we hereby make demand for payment of withdrawal liability.

The Board of Trustees resolved to apply the "presumptive" allocation method described in Section 4211(b) of the Act. Based on the formula set forth in this Section, we have computed total withdrawal liability due the Fund to be in the amount of $2,100,228.40. Under Section 4219(c)(1)(C)(i), the employer(s) owe annual payments of $424,027.08, with the first payment due as of January 1, 1988. Attached is a schedule which summar-

izes the determination of the withdrawal liability and the annual payment amount.

The annual payments must be paid in equal quarterly installments. (See Section 4219(c)(3).) Thus, liability payments are due on the first day of each calendar quarter throughout the amortization period until the liability is satisfied in full. The employer(s) is required to make a total of 23 quarterly installments to the Fund, each in the amount of $109,084.90, and a final partial quarterly installment equal to $82,903.81.

In lieu of installment payments, an employer may prepay the outstanding amount of withdrawal liability, plus accrued interest, in whole or in part at any time without penalty. An employer(s) is required to begin payment of the quarterly installments described above no later than sixty (60) days after the date of this demand, notwithstanding any request or appeal, which you have the right to make, as described below. Accordingly, the first payment is due to the Fund 60 days after the date of this letter, in the amount of $109,085.90, which includes one back payment.

If an employer fails to make a payment when due, interest on the payment shall accrue from the due date until the date on which the payment is made. In addition, in the event of default in payments, the Fund is entitled to require immediate payment of the total outstanding amount of withdrawl liability plus interest accrued on the total outstanding liability from the due date of the first payment which is not timely made. Interest on the overdue liability payments will be charged at the prevailing market rates for comparable obligations or at higher rates in the event of litigation.

We have determined that you were under common control with Hall's Motor Transit Company in the period from September 26, 1980 to at least the date of a claimed "corporate reorganization" by division under Section 4218

of the Act. Section 4218 of the Act provides that the successor in a corporate reorganization will be treated as the original employer. The successor in a division is defined by reference to Section 4062(d) of ERISA (as in effect in 1980) to encompass all corporations or employers resulting from the division. As part of a successor to the employer resulting from a claimed "division" of the former group of trades or businesses under common control, you remain an "employer" liable for unamortized withdrawal liability incurred during the period of common control.

The entire amount of unamortized withdrawal liability in this instance was incurred under the statute and "presumptive method" in the period September 26, 1980 to 1984. Your liability and payment schedule accordingly follow the schedule set forth above. This moots the issue of a potential continuation of common control past January, 1985. Based on available information, the Fund would otherwise determine that common control continued to the date of withdrawal by reason of either actual or constructive ownership of Hall's Section 4212(c) of the Act.

This determination is addressed and applicable to you and your affiliates under common control in the period September 26, 1980 to December 31, 1984, including:

Warren Transport, Inc.
Tiger Leasing Group
Tiger Air, Inc.
Tiger International, Inc.

This demand is not applicable to Hall's and other debtor entities to the extent prohibited by the Bankruptcy Code.

You have the right to request a review of the determination described in this letter. In this regard, within 90 days after receipt of this letter, you may, in writing:

(1) Ask the undersigned to review any specific matter relating to the determination of liability and the schedule of payments.

(2) Identify any inaccuracy in the determination of the amount of unfunded vested benefits allocable to an employer.

(3) Furnish any additional relevant information to the undersigned.

After review of such matters submitted in a timely manner, the Board of Trustees will notify you of its decision, the basis for the decision and the reason for any change in the determination of withdrawal liability or the payment scheduled. Failure to request a review in writing within 90 days, as set forth above, shall make the determination herein final.

Very truly yours,

/s/ Charles J. Schaffer, Jr.
CHARLES J. SCHAFFER, JR.
Administrator

CJS:djh
Enclosures
cc: Douglas Broadwater, Esq.
James Pack, Esq.
Kent Cprek, Es.
Hall's Motor Transit Co., Inc.
Other Listed Affiliates

TEAMSTERS PENSION TRUST FUND
OF PHILADELPHIA AND VICINITY

Employers Name	Halls Motor Transit
Firm Number	18-3774, 18-3775, 81-3776, 81-3777,
Address	
City/State	
ZIP	
Withdrawal Date	1987 Withdrawal

WITHDRAWAL LIABILITY CALCULATION SUMMARY

Part I	$1,103,310.54
Part II	$271,969.23
Part III	$1,786.27
Part IV	$303,541.16
Part V	$10,772.69
Part VI	$86,561.04
Part VII	$9,145.20
Part VIII	$157,079.87
Part IX	$11,146.03
Part X	$317,727.84
Part XI	$11,197.70
Part XII	($112,817.69)
Part XIII	$12,631.21
Part XIV	($92,730.98)
Part XV	$8,908.27
Total Unfunded Vested Liability	$2,100,228.40
De Minimis (If Applicable)	$0.00
Net Withdrawal Liability	$2,100,228.40

Prepared By————) A.B. Date 10/14/87

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY

Part I Share of Unfunded Vested Liability

A. Total Contributions Required for Five Years Ended 12/31/79	$619,776.37
B. Total Contributions for All Participating Employers for Five Years Ended 12/31/79	$99,865,122.10
C. Unfunded Vested Benefit Liability of Fund	
1. As of 12/31/79	$273,509,641.00
2. Unamoritized Amounts as of 12/31/86 (Item C.1. less 35 pct.)	$177,781,266.65
D. Employer's Share of Unfunded Vested Liability (A Divided by B X I.C. 2)	$1,103,310.54

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY

Part II Share of Change in Unfunded Vested Liability for 1980

A. Total Contributions Required for Five Years Ended 12/31/80	$815,214.47
B. Total Contributions for All Participating Employers for Five Years Ended 12/31/80	$118,492,735.88
C. Change (+ or −) in Unfunded Vested Benefit Liability	
1. 12/31/79 to 12/31/80	$56,472,016.00
2. Unamortized as of 12/31/86 (Item C. 1 Less 30 Pct.)	$39,530,411.20
D. Employer's Share of Unfunded Vested Liability-1980	$271,969.23

Part III Share of Reallocated Unfunded Vested Benefit Liability for 1980

A. Total Amounts of "De Mininis" Offsets Allowed to Employers Who Withdrew in 1980, and Other Amounts Determined by Trustees in 1980 to Be Uncollectable	
1. As of 12/31/80	$370,903.45
2. Unamortized Amt as of 12/31/86 (Item III.A. Less 30 Pct)	$259,632.42
B. Employer's Share of Reallocated Unfunded Vested Benefit Liability—1980	$1,786.27

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY

Part IV Share of Change in Unfunded Vested Liability for 1981

A. Total Contributions Required for Five Years Ended 12/31/81	$1,000,648.19
B. Total Contributions for All Participating Employers for Five Years Ended 12/31/81	$128,460,433.53
C. Change (+ or −) in Unfunded Vested Benefit Liability	
1. 12/31/80 to 12/31/81	$51,953,986.00
2. Unamortized Amounts as of 12/31/86 (Item C.1. Less 25 Pct.)	$38,965,489.50
D. Employer's Share of Unfunded Vested Liability—1981	$303,541.16

Part V Share of Reallocated Unfunded Vested Benefit Liability for 1981

A. Total Amounts of "De Mininis" Offsets Allowed to Employers Who Withdrew in 1981, and Other Amounts Determined by Trustees in 1981 to Be Uncollectable	
1. As of 12/31/81	$1,843,849.54
2. Unamortized Amt as of 12/31/86 (Item V.A. Less 25 Pct.)	$1,382,887.16
B. Employer's Share of Reallocated Unfunded Vested Benefit Liability—1981	$10,772.69

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY

Part VI Share of Change in Unfunded Vested Liability for 1982

A. Total Contributions Required for Five Years Ended 12/31/82	$1,160,518.72
B. Total Contributions for All Participating Employers for Five Years Ended 12/31/82	$135,567,265.92
C. Change (+ or −) in Unfunded Vested Benefit Liability	
1. 12/31/81 to 12/31/82	$12,640,339.00
2. Unamortized as of 12/31/86 (Item C.1. Less 20 Pct.)	$10,112,271.20
D. Employer's Share of Unfunded Vested Liability—1982	$86,561.04

Part VII Share of Reallocated Unfunded Vested Benefit Liability for 1982

A. Total Amounts of "De Mininis" Offsets Allowed to Employers Who Withdrew in 1982, and Other Amounts Determined by Trustees in 1982 to Be Uncollectable	
1. As of 12/31/82	$1,335,455.52
2. Unamortized Amt as of 12/31/86 (Item VII.1.Less 20 Pct.)	$1,068,364.42
B. Employer's Share of Reallocated Unfunded Vested Benefit Liability—1982	$9,145.20

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY

Part VIII Share of Change in Unfunded Vested Liability for 1983

A. Total Contributions Required for Five Years Ended 12/31/83	$1,318,980.36
B. Total Contributions for All Participating Employers for Five Years Ended 12/31/83	$145,393,034.90
C. Change (+ or −) in Unfunded Vested Benefit Liability	
1. 12/31/82 to 12/31/83	$20,370,354.00
2. Unamortized as of 12/31/86 (Item C.1 Less 15 Pct.)	$17,314,800.90
D. Employer's Share of Unfunded Vested Liability—1983	$157,079.87

Part IX Share of Reallocated Unfunded Vested Benefit Liability for 1983

A. Total Amounts of "De Mininis" Offsets Allowed to Employers Who Withdrew in 1983, and Other Amounts Determined by Trustees in 1983 to Be Uncollectable	
1. As of 12/31/83	$1,445,433.52
2. Unamortized Amt as of 12/31/86 (Item IX.A. Less 15 Pct.)	$1,228,618.49
B. Employer's Share of Reallocated Unfunded Vested Benefit Liability—1983	$11,146.03

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY

Part X Share of Change in Unfunded Vested Liability for 1984

A. Total Contributions Required for Five Years Ended 12/31/84	$1,416,485.37
B. Total Contributions for All Participating Employers for Five Years Ended 12/31/84	$154,581,799.58
C. Change (+ or −) in Unfunded Vested Benefit Liability	
1. 12/31/83 to 12/31/84	$38,527,877.00
2. Unamortized as of 12/31/86 (Item C.1 Less 10 Pct.)	$34,675,089.30
D. Employer's Share of Unfunded Vested Liability—1984	$317,727.84

Part XI Share of Reallocated Unfunded Vested Benefit Liability for 1984

A. Total Amounts of "De Mininis" Offsets Allowed to Employers Who Withdrew in 1984, and Other Amounts Determined by Trustees in 1984 to Be Uncollectable	
1. As of 12/31/84	$1,357,839.98
2. Unamortized Amt as of 12/31/86 (Item X.A. Less 10 Pct.)	$1,222,055.98
B. Employer's Share of Reallocated Unfunded Vested Benefit Liability—1984	$11,197.70

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY

Part XII Share of Change in Unfunded Vested Liability for 1985

A. Total Contributions Required for Five Years Ended 12/31/85	$1,458,643.20
B. Total Contributions for All Participating Employers for Five Years Ended 12/31/85	$161,336,529.68
C. Change (+ or −) in Unfunded Vested Benefit Liability	
1. 12/31/84 to 12/31/85	($13,135,213.00)
2. Unamortized as of 12/31/86 (Item C.1 Less 5 Pct.)	($12,478,452.35)
D. Employer's Share of Unfunded Vested Liability—1985	($112,817.69)

Part XIII Share of Reallocated Unfunded Vested Benefit Liability for 1985

A. Total Amounts of "De Mininis" Offsets Allowed to Employers Who Withdrew in 1985, and Other Amounts Determined by Trustees in 1985 to Be Uncollectable	
1. As of 12/31/85	$1,470,634.97
2. Unamortized Amt as of 12/31/86 (Item X.A. Less 5 Pct.)	$1,397,103.22
B. Employer's Share of Reallocated Unfunded Vested Benefit Liability—1985	$12,631.21

TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY

Part XIV Share of Change in Unfunded Vested Liability for 1986

A. Total Contributions Required for Five Years Ended 12/31/86	$1,186,143.92
B. Total Contributions for All Participating Employers for Five Years Ended 12/31/86	$171,202,708.27
C. Change (+ or −) in Unfunded Vested Benefit Liability	
1. 12/31/85 to 12/31/86	($13,384,956.00)
2. Unamortized as of 12/31/86 (Item C.1 Less 0 Pct.)	($13,384,956.00)
D. Employer's Share of Unfunded Vested Liability—1986	($92,730.98)

Part XV Share of Reallocated Unfunded Vested Benefit Liability for 1986

A. Total Amounts of "De Mininis" Offsets Allowed to Employers Who Withdrew in 1986, and Other Amounts Determined by Trustees in 1986 to Be Uncollectable	
1. As of 12/31/86	$1,285,835.79
2. Unamortized Amt as of 12/31/86 (Item X.A. Less 0 Pct.)	$1,285,835.79
B. Employer's Share of Reallocated Unfunded Vested Benefit Liability—1986	$8,908.27
A. Plan Year Ending 1980 ———)	31009
B. Plan Year Ending 1981 ———)	29233
C. Plan Year Ending 1982 ———)	26888
D. Total During 3 Highest=	87130
E. Average=	29043.33
1 Highest Average Annual # of Days Worked Over Three Consectuive Years.=	29043
2 Highest Contribution Rate to Date PF Withdrawal, ———)	$14.60
3 Amount of Each Annual Payment.=	$424,027.80
4 Number of Annual Payment (If) 20 then 20) =	5
5 Amount of Final Installment.=	$399,314.52
6 Amount of Each Quarterly Payments=	$109,085.90
7 Number of Full Quarterly Payments=	23
8 Amount of Final Quarterly Installments	$82,903.81

Withdrawal Liability (ML) ———)	$2,100,228.40
Annual Payment (AP) =	$424,027.80
I) Number of Full Year Payments. =	4,9530441164 4.312127
N =	5
V-N =	0.680583
II) Amount of Last Partial Annual Payments (PA) PA = (WL − (AP + A-)) / V-N =	$399,314.52
III) Determine the Amount of Each Full Quarterly Payments. = AP/3.8871 =	$109,085.90
IV) Determine Number of Full Quarterly Payments in Last Year (NQ) =	3
V) Amount of Last Partial Quarterly Payment PQ = :	
If NQ = 0 Then PQ = PA	0
If NQ = 1 Then PQ = PA − Q) /.9809	0
If NQ = 2 Then PQ = (PA − (1.9809 + Q)) /9623)	0
If NQ = 3 Then PQ = (PA − (2.9432 + Q) /9439)	82903.80536

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TEAMSTERS PENSION TRUST FUND
OF PHILADELPHIA AND VICINITY
Fourth and Cherry Streets
Philadelphia, Pennsylvania 19106
Walnut 3-6300

December 2, 1988

James A. Cronin, III
Tiger International Corporation
The Flying Tiger Line, Inc.
7401 World Way West
Los Angeles, CA. 90009

Re: Withdrawal Liability
Contributing Business: Hall's Motor

Dear Mr. Cronin:

By letter dated January 20, 1988, the trustees of the Teamsters Pension Trust Fund of Philadelphia and Vicinity ("Fund") demanded payment of withdrawal liability from the employer, including the Contributing Business, Tiger International Corporation, the Flying Tiger Line, Inc. and various affiliates. Your counsel has since claimed that the notice is invalid because it does not state a claim under ERISA § 4212(c) in his interpretation. The Fund and its trustees disagree both with the interpretation and the need to set forth a specific theory as well as the statutory requirements of demand, an amount and a payment schedule but leave those matters to the Court.

As a protective measure, however, the Fund and its trustees now explicitly demand payment of liability on alternative grounds under 29 U.S.C. §§ 1301(b), 1392(c) or 1398, as detailed in the Fund's briefs, in the event that your position about the original demand is sustained in litigation. We enclose a copy of the January 20, 1988

letter to provide notice of the amount, payment schedule and identified trades or businesses under common control to whom this protective demand is addressed. If the prior demand is found inadequate, actual payment must begin no later than 60 days from the date of this letter. Under ERISA § 4219(c), your initial payment should be $ 545,424.50 covering four payments back to January 1, 1988 and one installment accruing on January 1, 1989. Future installments would be due on the first day of each subsequent calendar quarter until the schedule is completed.

To the extent that a new demand is required, you have the right to seek review as detailed in the January 20 letter.

Sincerely,

/s/ Charles J. Schaffer, Jr.
CHARLES J. SCHAFFER, JR.
Administrator
For the Trustees

CJS:jp

cc: Peter Gold, Esq.
Kent Cprek, Esq.
William Bowser, Esq.
Barry Willoughby, Esq.

[Logo]

TEAMSTERS PENSION TRUST FUND
OF PHILADELPHIA AND VICINITY
Fourth and Cherry Streets
Philadelphia, Pennsylvania 19106
Walnut 3-6300

December 2, 1988

Peter Gold, Esquire
Blank, Rome, Comisky & McCauley
1200 Four Penn Center Plaza
Philadelphia, PA 19103

Re: Withdrawal Liability
Contributing Business: Hall's Motor

Dear Mr. Gold:

This letter concerns your letters of April 18, 1988 and May 23, 1988 about an assessment of withdrawal liability issued by this Fund to the employer including Halls Motor Transit Company ("Halls"), Tiger International Corporation, the Flying Tiger Line, Inc., Warren Transport, Inc. (jointly, "Tiger" and with Halls and any other trades or businesses under common control, "Employer"). You wrote for Tiger International Corporation, The Flying Tiger Line, Inc. and Warren Transport, Inc. Rudolph Barbee wrote on April 19, 1988 to adopt your claims for Tiger Air, Inc. and Tiger Leasing Group, Inc. We ask that you forward a copy of this letter to him. The Trustees of the Fund have reviewed the letters, sought additional information, consulted with legal and actuarial counsel and affirmed the initial assessment.

In September, 1988, the Fund sent a request for information under ERISA Section 4219(a) concerning your letters and documentation of your claims. On October 7, 1988, you responded that direct requests about documentation and research concerning the claim divestiture

of Halls were premature, overly broad, unduly burdensome and oppressive. Due to the failure to document claims, the Fund and its trustees have proceeded on the assumption that the information would be adverse to the interest of the Employer. The Fund has examined received available information from other sources as noted below.

Summary

The central objection is that Tiger was not under common control with Halls as of the date of its withdrawal from the Fund in 1987. Your objection is unfounded, based on the information available to the Trustees, for several reasons. The Fund assessed liability on three alternative bases: the "accrual" or year-by-year principle (ERISA §§ 4001(b), 4218), continued ownership (ERISA § 4001(b)) or an evasive transaction (ERISA § 4212(c)). Using the year-by-year control group principle adopted by the Fund under ERISA §§ 4001(b), 1398, Tiger is responsible for the share of unfunded vested liabilities of the Fund assessed to employers in the plan years from September 26, 1980 to, at least, 1984, even if Tiger divested itself of Halls before the date of withdrawal from the Fund. The total net liability in this case is based on the unamortized portion of these tiers. Due to the failure to produce documentation, we have further assumed that Tiger had or acquired either actual or constructive ownership of stock providing control of Halls as of the date of its withdrawal and thus affirm the alternative ground of assessment on this basis.

The Fund's January 20, 1988 demand letter also relied on ERISA § 4212(c) as the other alternative ground of assessment. The transaction between Halls and Tiger makes no economic sense absent consideration and attempted avoidance of withdrawal liability. The structure of the transaction as well as direct testimony confirms that a principal purpose of the transaction was to evade or avoid withdrawal liability. In this circumstance, ERISA § 4212(c) provides that withdrawal liability shall be as-

sessed and collected without regard to the evasive transaction.

Your objections about data and actuarial assumptions (Items 6, 7, 9, 10, 11 and 16) are standard and do not have application to the specific circumstances of the Fund. The suggestions on benefits and fiduciary duty (Items 5 and 8) are irrelevant to withdrawal liability and, in some cases, illegal. The Trustees have, in all events, conducted the affairs of the Fund in a prudent fashion consistent with law and the conduct of a similar organization of comparable size. The remaining objections about contractual and trust limitations on employer obligations, withdrawal liability exceptions and quarterly payment amounts (Items 2, 4, 12, 13, 14, 15 and 17) are contrary to legal precedent and in at least one case, frivolous.

Discussion

April 18 Letter

Your letter of April 18 characterizes itself as a "Request for Review." It states only the following in terms of objection to the assessment on behalf of Tiger.

> As you know, Tiger's Action also asserts that certain provisions of MPPAA are unconstitutional on their face and as applied (Counts II and III of the Amended Complaint, respectively). This Request for Review includes only those determinations which are subject in the first instance to plan determination, review and arbitration as set out in ERISA Sections 4219 and 4221.

The language of the letter does not ask for "review of any specific matter," "identify any inaccuracy" or "furnish additional relevant information" under MPPAA. Any claims reflected in the letter are denied.

The Fund is unable to address constitutional objections without further detail. The only constitutional challenge

sustained in any court to our knowledge is a challenge to the "presumption" in favor of the Fund under ERISA § 4221(a)(3)(B). The Fund has reviewed this decision and believes that its actuarial assumptions are correct with or without the presumptions. The "as applied" challenge, is denied by reason of the failure to furnish supporting documentation.

We are able, from past experience, to explain our evaluation of constitutional claims in a general sense. MPPAA was under active consideration in Congress in 1978, with serious consideration in 1979. The statute was substantially complete and extant in the business world by 1980. On policy grounds, there may be reasonable argument that Congress should have continued some form of five-year reachback matching former ERISA § 4064 rather than allocating all existing liability to employers as of 1980. As a legal matter, however, Congress chose the 1980 effective date and that decision has been upheld by the Supreme Court against constitutional challenges.

Congress designated the plan as a defined benefit plan—not the collective bargaining representatives. Halls and Tiger received information on the Fund and its benefits through summary plan descriptions and other documents distributed to employers by the Fund. They entered collective bargaining and chose contribution rates with knowledge of the resulting benefits. Congress determined that circumstances surrounding a contribution agreement like that made by Halls create benefit expectations in participants which should be satisfied by the employer.

The benefit obligation incurred towards these participants is funded like a mortgage. Congress allowed for deductibility of contributions for any member of a control group and counterbalanced it with withdrawal liability. The cessation of contractual contributions leaves an unpaid debt, regardless of the reason for withdrawal. Con-

gress simply mandated continuing amortization payments, with continued deductibility. The public generally pays roughly one-third to one-half of the liability through a tax subsidy. This is an entirely rational and balanced approach to the interests of participants, continuing contributing employers and withdrawn employers.

Halls seems to be a reasonably classic example of the Fund's situation with the number of "its" retirees likely exceeding active employees remaining at the time of shutdown. The unfunded "attributables" liability will likely approximate or exceed the assessment.

We have reviewed the data and confirmed the mathematical accuracy of the withdrawal liability calculation. The Plan's contribution records are fully automated on a cash basis. They have been statistically audited over all for all years since 1975 and are converted to an accrual basis for financial reporting and withdrawal liability purposes. You should already have the certified statements of the Fund's enrolled actuary for relevant years concerning the Fund's actuarial assumptions, the value of its assets and the amount of unfunded vested liabilities.

May 23 Letter

Your letter of May 23, 1988 is more detailed. We have indented and repeated your objection and followed it with our response at the regular page margin on each point.

1. *The Fund's Theory of Liability*

The Fund's basis for asserting withdrawal liability against Tiger is set out in its Demand (attached as Exhibit "A" to the Opening Brief in Support of Plaintiff's Motion for Partial Summary Judgment in Civil Action No. 86-304 commenced in the District Court in Delaware). That Motion and Brief set out, in

> substantial part, the basis for challenging the Fund's "accrual" theory of withdrawal liability asserted against Tiger.

In the "Brief of Teamsters Pension Trust Fund of Philadelphia and Vicinity on Flying Tiger Motion for Summary Judgment" ("Fund Brief") the Fund states:

> The Philadelphia Fund issued its assessment to Flying Tiger after cessation of operations by Halls in the Philadelphia Fund in 1987. The assessment notes three alternative grounds of liability: Liability as part of a 'deemed original employer' under 29 U.S.C. § 1398, liability as part of a continuing control group under 29 U.S.C. § 1301(b) and, finally, liability by reasons of a transaction to 'evade or avoid' withdrawal liability under 29 U.S.C. § 1392(c).
>
> Tiger challenges and requests review of these claims only to the extent that they have been asserted against Tiger in a proper demand for withdrawal liability made pursuant to 29 U.S.C. § 1399 (b)(1) and only to the extent that each is subject to a controlling determination that it is subject to MPPAA's plan review, arbitration and appeals procedures. (Footnotes omitted).

The basis of the Fund's claim has been set forth in the brief you reference, which is incorporated by reference for the sake of brevity. The Fund expressly confirms that the demand letter was issued on three independent grounds: the year-by-year method under ERISA §§ 4001 (b), 4218, an "evade or avoid" transaction under ERISA § 4212(c) and possible continued ownership under ERISA § 4001(b). Each ground separately supports the entire assessment in this case.

2. *Tiger Was Not Bound to a Collective Bargaining Agreement*

Subsequent to 1985, neither Tiger nor any of its controlled group members was a party to a collective bargaining agreement which contained an obligation to contribute to the Fund. Thus, Tiger is not responsible for the withdrawal liability triggered by Halls subsequent withdrawal from the Fund.

Withdrawal liability is a statutory liability imposed on all trades or businesses under common control for purposes of ERISA § 4001(b). The courts have rejected claims that pension liability is either limited by contract or an unconstitutional impairment of a contract. In *PBGC v. Quimet Corp.*, 630 F.2d 4 (1st Cir. 1980), the Court imposed liability on trades or businesses under common control which were not party to a pension plan or the collective bargaining agreement under which it was maintained. In the legislative history of MPPAA, Rep. Thompson, speaking as Committee chair, approved the *Quimet* decision and indicated that ". . . withdrawal liability should be applied in a manner with the controlled group concept," 126 Cong. Rec. 23038 (August 25, 1980). The courts have followed *Quimet* and this principle as do the Trustees of the Fund in the exercise of their duties of prudence and collection under ERISA §§ 4202, 404.

3. *Tiger Was Not an "Employer" on the Date of Halls Withdrawal*

Neither Tiger nor any of its controlled group members were related to Halls within the meaning of 29 U.S.C. § 1301(b), on the date of Halls alleged withdrawal from the Fund. Nor did Tiger engage in any transaction within the meaning of ERISA Section 4212(c). Therefore, Tiger is not responsible for Halls withdrawal liability.

The date of withdrawal is not the relevant "period" of time under the "presumptive" method in ERISA § 4211 and 26 C.F.R. § 1.414(c)-1. See answer to Paragraph 2 and above. If it were, Tiger is nonetheless responsible for the full withdrawal liability under ERISA §§ 4001 (b), 4212(c).

The demand letter from the Fund asserted liability under ERISA § 4001(b) based on the probability that Tiger had record ownership of at least 25% of Halls stock on the date of withdrawal and retained or had an option on any other "outstanding" stock of Halls for control group purposes. Tiger has not produced documentation of its ownership, the "sale" or other related matters (payment, default, etc.) needed to establish the record ownership of Halls and convert record ownership to "ownership" under the control group regulations. The Fund accordingly assumes that the information would be adverse to your claims and affirms the assessment on this basis.

Tiger also has not produced evidence of substantial and legitimate business reasons (independent of and overshadowing withdrawal liability) for the claimed sale of Halls. We accordingly affirm the assessment under ERISA § 4212(c).

ERISA § 4212(c) provides:

> If a principal purpose of any transaction is to evade or avoid [withdrawal] liability . . ., [MPPAA] shall be applied (and [withdrawal] liability shall be determined and collected) without regard to such transaction.

The language of ERISA § 4212(c) is almost identical to § 269 of the Internal Revenue Code which deals with evasion or avoidance of income tax liability. It differs only in its greater scope. The evasive purpose under ERISA need only be "a" principal purpose of the transaction rather than "the" purpose as required under the

tax code. ERISA covers transactions which seek either to "avoid" liability as well as "evasion" while the tax code prohibits only evasion.

The Third Circuit had the following observation about Tiger's claimed sale of Halls stock:

> the district court here concluded that "[t]he present factual submissions and allegations before the Court indicate that there is a genuine factual dispute surrounding the [bona fides of the] 1985 transaction." [21]

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[21] On the record before us, we cannot fault the district court's assessment. The record evidence includes, for instance, an affidavit by Thomas C. Nyhan, one of Central States' attorneys in the Halls bankruptcy proceeding. Nyhan states that, at a meeting of Halls creditors on May 14, 1986, Alvin Bodford, the sole shareholder of HAC, "stated that a principal purpose of the transfer of 75% of the common stock of Halls Motor Transit Co. to Halls Acquisition Corp. was to evade or avoid withdrawal liability." J.A. at 292. In addition, we take judicial notice of the fact that actors in our free enterprise system are not primarily guided by their eleemosynary impulses: when a large corporation relinquishes for no consideration at all its remaining 25% interest in another corporation, a unique event has occurred. On the whole, it is easy to understand why a detailed factual inquiry is needed to ascertain whether Tiger's "sale" of Halls to HAC was made to evade or avoid MPPAA withdrawal liability.

Flying Tiger v. Central States, 830 F.2d 1241, 1254 n. 21 (3d Cir. 1987). The gift may be explained only as an effort to avoid any possible application of the control group stock exclusion rules which would transform Tiger's 25% interest into 100% of outstanding stock for control group purposes.

Counsel advises that the following types of factors have been found to evidence as "evasive purpose" under the tax code.

1. Top management awareness of the tax impact. The concern here, of course is knowledge of withdrawal liability.

2. A disproportionate purchase price reflecting consideration of the liability. In the ERISA context, this would suggest evidence of a transfer "price" that implicitly reflects a discount for the effect of withdrawal liability.

3. The simple magnitude of the tax treatment in dollar terms, or in proportion to other financial aspects of the transaction. We understand that denial of any consideration of major dollar item can result in a negative inference on intent.

4. A lack of need for a particular transaction structure to achieve stated goals. In other words, if two means would serve the stated purpose, choice of a vehicle with an evasive impact can be suspect.

5. A lack of indicia of an arm's-length transaction This type of proof tends to adopt insolvency standards. Elimination of a guaranty is a functional equivalent of many divestiture transactions involving withdrawal liability. Our counsel has found the bankruptcy case law on guaranties to be helpful precedent.

6. Lack of "follow-up" to achieve stated goals. The courts look to see whether actual behavior *after* the transaction was consistent with and corroborates stated purposes.

All of these factors support Tiger's liability in this case.

Management Awareness. The management of both Tiger and Halls clearly were aware of withdrawal liability. The buyer was an insider (Halls management) with actual knowledge of withdrawal liability. Withdrawal liability was reflected on financial statements. The subject is discussed at length in the sales document, including an express provision requiring Halls to hold Tiger harmless from any withdrawal liability. Alvin Bod-

ford, chief executive of Halls, averred that a principal purpose of the sale was to evade or avoid withdrawal liability. Tiger's own Form 10-K immediately following the sale included a statement that management of Tiger believed it would not be responsible for any withdrawal liability connected to Halls. Form 10-K is directed to investors and the statement apparently was material in terms of indicating that Tiger had avoided potential liability.

Disproportionate Purchase Price. Halls had a book value for shareholder equity of $14 to $16 Million at the time of the sale. Tiger also had advanced $11 Million or more in intracompany advances at the time of the sale according to its claims. Tiger nonetheless claims to have sold 75% of the stock to Halls' Acquisition Corporation for $1,000. The intracompany debt was reduced to $10.5 Million in exchange for a secured (as opposed to un-secured) position for the claims.

If withdrawal liability is taken into account, there was negative shareholder equity at the time of the sale and the recovery on intracompany debt as an unsecured claims in a liquidation would be substantially less than face. The actual sales price is consistent with book value, *after* adjustment for withdrawal liability. The sales price and terms do not make economic sense without consideration of withdrawal liability.

Magnitude of Withdrawal Liability. The withdrawal liability associated with Halls was estimated at $40 Million in Halls financial statements as of December 29, 1984. Halls long-term bank debt at December 29, 1984 totaled $19,320,000 and aggregate liabilities (other than to Tiger or for withdrawal liability) were $50,742,000. The book value of all assets was $77,847,000. Estimated withdrawal liability was equal to 80% of all other debt combined and just over one-half of all assets. It was a major financial factor.

Need for a Sale. Tiger has claimed that it wanted to give Halls management and employees an incentive to turn the company around, that Halls management was very optimistic in that respect and that Tiger's good faith is shown by the fact that it continued to assist Halls after the sale. These reasons and conduct do not demonstrate the need for a sale.

The management and employees of Halls could have been compensated in any number of ways for success in a turnaround without a "sale." The optimism of Halls management is equally irrelevant as they literally paid nothing for the company. They would gain substantially from a turnaround but would lose nothing from the bankruptcy. Halls likely was not otherwise saleable. Halls management got, at best and however unlikely, a valuable company in a turnaround and, at worst, executive compensation for an additional number of years. The only other alternatives likely were continued ownership by Tiger or liquidation, both of which would leave Tiger open to withdrawal liability claims under its analysis. The "sale" was the only means to achieve Tiger's withdrawal liability aims and the choice indicates an evasive purpose.

The financial support given to Halls by Flying Tiger is likewise unimpressive. Such support is common in efforts to stall a bankruptcy for at least one year in order to avoid the anti-preference provisions of the Bankruptcy Code.

Follow-up. Tiger has not disposed of its other subsidiaries in financial trouble to our knowledge. It retained North American Rail Car despite a much more expensive bankruptcy and drain on its assets. The alleged "follow-up" in terms of subordinating claims in order to allow Halls to obtain financing appears to be related to bankruptcy considerations rather than an interest in the future of Halls. Once the year necessary to avoid the Bankruptcy Code preference provisions had passed, support was withdrawn and Halls collapsed.

Arm's-Length Transaction. This issue tends to focus on bankruptcy-type concerns. We have found it helpful to discuss it in terms of the common law of fraudulent conveyances and bankruptcy preferences.

The facts tend to show simple bankruptcy planning and a fraudulent conveyance or bankruptcy preference. The scope of the "evade or avoid" prohibition should, at a minimum, encompass these types of transactions. The elements of common law fraudulent conveyance, whether under the federal Bankruptcy Code or state law, generally can be shown either through actual intent or intent inferred from a transfer involving an insolvent or underfinanced debtor.

Alvin Bodford, CEO of Halls, has stated that a principal purpose of the "sale" was to "evade or avoid" withdrawal liability. The detail devoted to withdrawal liability in the sales documents and express announcement in Tiger's next 10-K that management believed Tiger had no responsibility for Halls withdrawal liability corroborate Bodford. This shows the necessary actual intent.

The other strain of fraudulent conveyance law concerns transfers made for less than reasonably equivalent value while a debtor was insolvent or which left the debtor with unreasonably small capital or unable to meet debts as they matured after the transaction. There is a fraudulent conveyance under this second standard as well as in this case.

Tiger's actions with respect to Halls make economic sense only in the perspective of bankruptcy rules on preferential transfers. Under 11 U.S.C. § 547(b), a transaction with an insider (a term including controlling shareholders like Tiger) can be set aside under the following circumstances:

1. A transfer was made on account of an antecedent debt owed before the transaction.
2. Halls was insolvent at the time of the transfer.

3. The transfer allowed Tiger to receive more than it would in a liquidation of Halls under Chapter 7 of the Bankruptcy code.
4. The transfer was made within one year before the bankruptcy petition.

The one-year limitation is not relevant to withdrawal liability in light of ERISA's six-year period of limitation. The facts are consistent with an effort to avoid the preference rules by keeping Halls out of bankruptcy for one year after the sale.

A Transfer. The creation of a security interest in the assets of Halls is a transfer as is elimination of liability by a guarantor on obligations of a debtor. The divestiture of Halls by Tiger had both aspects.

Antecedent Debt. The stock of Halls was sold for $1,000. The security interest created in favor of Flying Tiger was expressly made in contemplation of alleged loans made to Halls by Tiger and its other affiliates from the past. The elimination of the withdrawal liability "guaranty" likewise eliminated "antecedent debt" on withdrawal liability in a bankruptcy sense. The various decisions denying priority to withdrawal liability rely on the premise that withdrawal liability reflects antecedent debt incurred before the actual date of withdrawal.

Liquidation Preference. In a Chapter 7 bankruptcy as of the date of the sale, Tiger would have shared ratably with withdrawal liability claims on any unsecured assets with respect to intracompany loans (assuming they actually were loans rather than capital contributions). Tiger's equity in Halls would have been worthless.

Using Halls 1984 financials as a source,[1] Halls assets and liabilities would have produced the following distribution at a liquidation immediately before the sale.

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[1] Liabilities to Tiger and affiliates are based on pre-sale amounts per n.5 to the Halls 1984 financial statement. Withdrawal liability is estimated at $40 Million in n.10 of the statements.

Liability	Liability Amount	Available Assets	Percentage Recovery
Secured Liability			
— Banks	$19,320,000	$19,320,000	100%
— Tiger	0		
Unsecured Liability			
— Tiger	$11,860,000		69.35%
— Withdrawal Liability (W/L)	$40,000,000		69.35%
— Other	$32,529,000	$58,527,000	69.35%
	$84,389,000		
Equity		0	0%
		$77,847,000	

A portion of the unsecured liability would actually have priority under 11 U.S.C. § 507 and further reduce distribution on Tiger's claims. Tiger's expected recovery would only be 69.35% of its loans, or $8,224,910 as equity was negative. An even less attractive possibility (under *Quimet*) would make Tiger pay the full $40 Million of withdrawal liability outside the bankruptcy which, netted against full recovery of the loans and $14 Million in book equity, still produces an absolute loss of $14,140,000.

The effect of the "sale" and creation of a security interest in favor of Tiger was to enhance Tiger's bankruptcy position under Tiger's analysis of withdrawal liability. The grant of security gave Tiger preference over other unsecured creditors of Halls, including priority claimants such as employees, fringe benefit funds (up to the $2,000 per employee limit) and tax claims.

Using the same base from the Halls 1984 financials, the "post sale" allocation changed the distribution to move Tiger from unsecured to secured status, and improve its position:

Liability	Liability Amount	Available Assets	Percentage Recovery
Secured Liability			
— Bank	$19,320,000		100%
— Tiger	$10,500,000		100%
	$29,820,000	$29,820,000	
Unsecured Liability			
— Tiger	0		66.22%
— W/L	$40,000,000		66.22%
— Other	$32,529,000		
	$72,529,000	$48,027,000	0%
Equity		0	
		$77,847,000	

Tiger's expected recovery now would be the full face amount of the note, $10.5 Million with, in Tiger's view, no withdrawal liability.

Tiger needed to keep Halls alive for at least one year after the sale in order to validate its security interest against a preference attack under 11 U.S.C. § 547. This accounts for Tiger's efforts to assist Halls in obtaining additional financing in 1985. Once the year had passed, Halls was allowed to collapse.

The new financing obtained by Halls at the time of the sale and afterwards was apparently based entirely on the liquidation value of its assets rather than any expectation that Halls would fund the debt out of future earnings. The lenders did their work well as Halls assets were promptly liquidated in full payment of all claims of the secured lenders with a more than sufficient cushion.

4. *Interest on Timely Quarterly Payments.*

The Demand adds interest in calculating the amount of each quarterly payment, rather than dividing the annual payment by four. This increases the amount of each quarterly payment. This addition of interest to timely quarterly payments is not

authorized under ERISA Section 4219(c)(3). The statutory provision which governs the payment of interest for late payments confirms that interest is not to be added to timely payments.

ERISA § 4219(c)(1)(A)(i) provides that ". . . an employer shall pay [withdrawal liability] over the period of years necessary to amortize the amount in *level annual* payments . . . , calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first of each subsequent plan year." ERISA § 4219(c)(1)(A)(ii) provides that the amortization period will be calculated using the assumptions used for most recent actuarial funding evaluation for the plan period using standard actuarial methodology.

Each annual payment has been broken into quarterly installments in accordance with the funding assumptions required by ERISA § 4219(c)(1)(A)(ii). The law refers to amortization of the annual payment and does not specify the manner of calculating the quarterly installments other than to say that they shall be done in accordance with plan funding assumptions. A claim that the quarterly installments must be simply one-fourth of the annual payment ignores the requirement that the payment schedule be amortized under the plan's funding assumptions as if each payment were made on the first day of the plan year. Deferred payment of one-fourth of an annual payment due on the first day of each year would not amortize the liability in accordance with the statutory rule. If lower quarterly installments were commanded by statute, the payment schedule would simply be extended and actually create additional liability on the part of the employer.

5. *Increase in Benefits While the Fund Had Significant Unfunded Vested Benefit Was Improper*

An analysis of the Fund's demand, worksheets and other papers indicated that the Fund increased benefits at times when it had significant unfunded vested benefits. These increases occurred without notice to contributing employers, without their assent, and is contrary to principals of sound Fund administration and other principals of law and equity.

See answer to Paragraph 8. As a matter of business, and hence fiduciary, reality, it is difficult or impossible to retain the loyalty of employees and remaining employers and obtain increased contributions without periodic benefit increases. The "presumptive" method is structured to allow such increases and does not apply all new money to fund prior debt of withdrawn employers.

6. *Interest Rate and Other Assumptions Are Unreasonable.*

The interest assumption used by the Fund in determining withdrwal liability is not reasonable for this purpose. The assumptions used by the Fund are, in the aggregate, unreasonable.

The law requires that actuarial assumptions be "in the aggregate, reasonable" and "offer the actuary's best estimate of the anticipated experience under the plan . . . ., ERISA § 4213(a)(1). The Fund has a large enough group of participants to form a valid separate statistical population. The Fund has based its actuarial assumptions and methods used in determining withdrawal liability on the actual long-term experience of the group. These assumptions together produce a better estimate of the actual anticipated experience of the Fund in terms of investment, mortality and other factors than reliance on general characteristics of the entire population. The Fund periodically reviews its actual experience and actuarial

assumptions and methods to assure that they remain reasonable. The Fund has sent or shortly will forward a standard information package detailing the basis of the calculation of liability to you. The general information includes the certified statements of the Fund actuary concerning statutory compliance.

We are unable to respond to any particular concerns without further specification. The Fund has estimated differences in liabiilties under varying methods and assumptions and found that the results "in the aggregate" generally equal or exceed liability determined under the Fund's assumptions.

7. *Reallocated Unfunded Vested Benefits.*

A percentage of Halls withdrawal liability resulted from reallocated unfunded vested benefits of withdrawn employers. To meaningfully ascertain and verify this percentage and these amounts and to determine whether previous compromise settlements have been properly attributed, the following information is requested:

(a) For each employer who is or was contributing to the Fund with respect to which any reallocated vested benefits were included in the determination of withdrawal liability made against Tiger in accordance with the ERISA Section 4211(b)(4), the identity of the employer and date of the withdrawal;

(b) Amount of withdrawal liability originally determined for such employers without respect to the operation of Section 4209, 4219(c)(1)(b) and 4225 of ERISA;

(c) The date on which the Fund notified such employer of the amount of withdrawal liability, and the amount of withdrawal liability;

(d) The date and amount of each payment received by the Fund on or before December 31, 1987, with respect to the withdrawal liability of such employer;

(e) The amount of reallocated unfunded vested benefits included in the determination of the withdrawal liability of Tiger;

(f) The reason any amount included in "(e)" above was determined to be uncollectible, unassessable, or not assessed by the Fund; and

(g) The date on which the Fund determined that such amount was to be included in reallocated unfunded vested benefits.

This is a request for information rather than review. It is not information required to be produced under ERISA § 4221(e). The Fund will consider production in connection with arbitration with adequate protection of the confidentiality and privacy concerns of the Fund and other employers, including various settlement agreements prohibiting disclosure.

The effect of reallocation of unfunded vested benefits on the determination of the Employer's withdrawal liability is minimal. No change will make the liability, in the aggregate, unreasonable. Reallocation has, to the date of concern, been limited essentially to incontestable "write-offs" such as *de minimis* claims and elimination of claims required by the Deficit Reduction Act. The Fund practice to date produces lower reallocation figures than PBGC standards reflected in its mass withdrawal liability regulations.

8. *The Benefits Should Have Been Reduced.*

The Fund should have reduced benefits given the significant amount of unfunded vested liability so as to be on a financially sound basis consistent with the Trustees' fiduciary obligations.

ERISA generaly contemplates the existence of unfunded liability and allows it to be amortized over periods up to 40 years. Reduction of most Fund benefits is generally illegal under ERISA §§ 204(g), 4244A, as the Fund is not in reorganization or insolvent. Due top overrriding illegality, it is unlikely that the IRS would approve an amendment under ERISA § 302(c)(8) seeking to reduce or eliminate benefits specifically protected in Title IV of ERISA. The Fund raised its normal retirement age in recent years as allowed by law and taken other steps, including withdrawal liability collection, allowed by law to assure that it will fulfill its purpose to provide retirement income over the long term. The Trustees of the Plan believe they have properly addressed their fiduciary responsibilities in dealing with such events as the enactment of ERISA and deregulation of the trucking industry with their multiple effects on the Fund's income and liabilities.

9. *Missing Data for Dates of Birth.*

It has been reported that there is a significant missing date of birth date. We have obtained a report indicating that dates of birth were missing for thousands of active members and terminated vested members. Our actuaries advise that these are abnormally high missing data levels. We understand that it was assumed that active members were age 29 and higher and that terminated vested members were currently age 49. To ascertain the reasonableness of these assumptions, we request the following information:

With respect to all the active members without a validated date of birth according to Schedule "E" of the report setting forth unfunded vested liabilities as of December 31, 1987, provide information in one of the following forms:

(a) Listing showing the years of vesting service as of December 31, 1987 for each such active member, or

(b) Tabulation of the number of members classified by years of vesting service as of December, 1987, or

(c) Tabulation as described above, but classified by quinquennial of vesting service (i.e., 0-4 years, 5-9 years, etc.) rather than individual years.

See answers to Paragraphs 5 and 7. Your sources are inaccurate. The missing data is not significant. The single most important item of liability in this Fund is for retirees. There are no missing birthdates in this category. Any missing data on other participants is assumed to be consistent with the general Fund population. The average funding entry age for active participants with dates of birth has been consistently close to 29. The average attained age for vested terminations with dates of birth between 49 and 51 has varied during the last seven years. An age 49 assumption produces lower liability than a higher age. Exclusion of participants with missing birth dates is less accurate but has no material impact on liability:

10. *The Fund's Investment Return.*

Our information indicates that the Fund's investment return fluctuated widely between plan years 1977 and 1987. Please provide any information you have on the Fund's investment return for the last ten (10) plan years. Further, please provide for each of the plan years a schedule of the benefits and expenses paid by the Fund and to whom they were paid.

See answers to Paragraphs 5 and 7. Your information is wrong. The basic information you seek is included in the

Fund's general data package and other public information. The investment markets fluctuated wildly in the years 1977 to 1987. The Fund's investment policy is more conservative than the market due to a large number of retirees and has not exhibited the same variation. Withdrawal liability is determined using the fair market value of assets.

11. *Mortality Rates. Other Assumptions and Methodologies.*

> Information in our possession indicates that there is significant missing data relating to the mortality of persons eligible to receive, or who are currently receiving, benefits. In calculating the alleged withdrawal liability, we believe that the Fund actuaries may not have purged from Fund records deceased participants whether on active or retirement status. Kindly advise whether in calculating the withdrawal liability asserted whether decreased participants were purged from the Fund's records. Also advise whether the list of participants was checked against social security date and when such check occurred. Further, in a reasonable detailed fashion, please advise us of all assumptions which were employed with respect to mortality.
>
> We question all the assumptions and methodologies used by the Fund including past service attribution and crediting methods, initial employment dates, retirement age, etc.

See answer to Paragraph 6. The assumption and basic data are in the general Fund package. Fast service and initial employment dates for new employers are based on census data questionnaires prepared by the employer on entry into the plan. Service data for other participants is based on Fund contribution records. The mortality assumption errs, if at all, in overstating deaths.

The Fund has used the services of an organization to match Social Security records to determine whether any

persons receiving retirement benefits are deceased for a number of years. A report in 1983 indicated that no person then receiving a retirement benefit from the Fund was deceased. This service also has been used to delete retired and terminated vested employees who have died from Fund records.

12. *The Fund is a Defined Contribution, Not a Defined Benefit Plan, and It Is Not Subject to MPPAA.*

The Fund's assessment of withdrawal liabilities is premised on the view that it is a defined benefit plan and is subject to MPPAA. It is Tiger's position that absent proof to the contrary, the Fund is not a defined benefit plan, is not subject to MPPAA, and should not assess withdrawal liability.

The courts and PBGC consistently have said otherwise. As a matter of fiduciary prudence, the Fund has followed judicial authority.

13. *Employer Liability is Limited Under the Declaration of Trust.*

The Fund's Declaration of Trust provides that an employer's liability is limited to making contributions to the Fund as required by the applicable collective bargaining agreement and applicable law. There is no requirement to make withdrawal liability payments nor are the Trustees authorized to demand such payments without specific authorization under the Declaration of Trust.

See answer to Paragraph 2.

14. *MPPAA Is Preempted by, and Conflicts with, the National Labor Relations Act, as Amended*

An employer's obligation to contribute to a multiemployer pension plan is derived from collective bargaining and is memorialized in a collective bargain-

> ing agreement. The National Labor Relations Act, as amended, 29 U.S.C. § 151 et. seq. ("NLRA"), provides that the collective bargaining process and agreements on mandatory and permissive subjects of bargaining are committed exclusively to the parties. The NLRA specifically provides that the parties are free *not* to agree on any subject. 29 U.S.C. § 158(d). Payments to a pension plan is a mandatory subject of bargaining. By requiring an employer to make withdrawal liability to a pension plan MPPAA interferes with what the NLRA mandates should be a process left exclusively to the parties. Thus, MPPAA is contrary to, and inconsistent with, the NLRA. Therefore, it is invalid and unenforceable.

This is a frivolous claim. Congress can repeal its own work. Under all rules of statutory construction, a later statute overrides an earlier one. As a result, the NLRA is repealed to the extent of any conflict.

15. *Trucking Industry Exemption.*

> Tiger's position is that absent conclusive proof and a final determination to the contrary, the Fund is subject to the Trucking Industry Exemption from withdrawal liability set out in ERISA Section 4203(d), 29 U.S.C. § 1383(d). Further, to the extent the Fund has previously determined that this Exemption is not applicable, Tiger challenges the basis for, and methodology employed, in that determination as well as that determination.

The Fund has examined its records and determined otherwise. Based solely on activities of contributing businesses, the Fund has not found 85% or more of its accounts to involve long or short haul trucking, household goods moving or public warehousing based on contract codes, key words or ICC Class I and II carrier data. Approximately 30% of contributions come from accounts which clearly would not be in covered industries under any approach. Tiger, as a control group employer, is also not

primarily engaged in long or short-haul trucking, household goods moving or public warehousing and thus would not be eligible for relief under the special rule in any event.

16. *Additional Information Requested.*

In addition to the information/documents requested above, kindly provide the following information and/or documents:

(a) The Fund's financial statements for each plan year from January 1, 1975 to the present;

(b) The Fund's actuarial reports for each plan year from January 1, 1975 to the present;

(c) A list of all employer who have withdrawn from the fund, including the following for each: name, date of withdrawal, date of assessment, withdrawal liability assessed, status and disposition of assessment;

(d) Describe any and all withdrawal liability and delinquent contribution settlements or amounts deemed uncollectible, including the reasons for such actions;

(e) For each plan year used in calculating Halls withdrawal liability, provide the identity and address of the Fund's investment manager;

(f) For each plan year commencing with 1974 provide a listing of the form of insurance purchased by the Fund, from whom the insurance was purchased, and all payments made to said insurance companies or person who are in any way related to them;

(g) With respect to all missing participant information used in preparing the acturial evaluation what assumptions, if any, did the Fund's actuary use to compensate for missing information? Please specify in detail;

(h) Many Funds have employed a service to check the social security numbers of its retired and vested terminated participants against the death records maintained by the Social Security Administration. When was the last time this service was performed for this Fund and what were the financial results?

(i) Many Funds use a service to monitor the investment performance of the Fund (i.e., SEI Fund Evaluation). Please furnish any information regarding the monitoring of the investment performance of the Fund in the last ten years;

(j) Please provide a copy of the Fund's Declaration of Trust, all amendments, rules, regulations, summary plan descriptions, etc. for each year commencing with 1974;

(k) Please provide the number of Halls former employees for whom pension benefits have vested and the amount of vested pension benefits as of December 31, 1987 for each such former employee, and his or her name and address;

(l) For each employer with respect to which any reallocated unfunded vested benefits were included in the determination of the withdrawal liability demand in accordance with ERISA § 4211(b)(4), please provide the following information:

(1) Name of employer;

(2) The date of withdrawal;

(3) Amount of withdrawal liability originally determined without respect to the operation of Section 209, 4319(c)(1)(B) and 4225 of ERISA;

(4) The date at which the Fund notified such employer of the amount of withdrawal liability, and the amount of the liability;

(5) The date and amount of each payment received by the Fund with respect to the withdrawal liability of such employer;

(6) The amount of reallocated unfunded vested benefits included in the determination of the withdrawal liability of Tiger;

(7) The reason any amount included in the foregoing was determined to be uncollectible, unassessable, or not assessed; and

(8) The date on which the Fund determined that such amount was to be included in reallocated unfunded vested benefits.

See responses to Paragraphs 6, 7, 9, 10 and 11. The information required to be produced under ERISA § 4221(e) is included in the standard information package.

17. *Erroneous Data, Assumptions and Methodologies.*

As indicated above, Tiger herein challenges, and retains its right to challenge, all assumptions and methodologies used by the Fund in calculating the asserted withdrawal liability, including both actuarial and other assumptions used to supply missing date for dates of birth, mortality rates, past service attribution and crediting methods, initial employment dates, retirement ages, etc.

See response to Paragraphs 6, 7, 9, 10, 11 and 16.

18. *Tiger Did Not Benefit From and/or Exercise Actual Control of Halls on the Date of Withdrawal*

Assuming *arguendo* that Tiger was within Halls controlled group on the date of withdrawal, because

Tiger did not benefit from and/or exercise actual control over Halls on that date it cannot be responsible for Halls withdrawal liability. See *In Re: Challenge Stamping and Porcelain Company Hourly Employees Pension Plan*, 719 F.2d 146 (6th Cir. 1983); *PBGC v. Quimet Corporation*, 630 F.2d 4 (1st Cir. 1980); *PBGC v. Anthony Company*, 537 F.Supp. 1048 (E.D. Ill. 1982); and *Central Transport Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 639 F.Supp. 788 (E.D. Tenn. 1986).

Under the law in this circuit and case, Tiger was admittedly once an "employer." The burden is on Tiger to show that it subsequently ceased to be an employer. It has not done so.

The *Quimet* case is directly contrary to your claim. *Challenge Stamping* and *Central Transport* have been held inapplicable to this case. The *Anthony* decision relies on a mistaken premise that limited liability and state corporate boundaries are constitutional barriers to Congressional action and has no precedent nor following.

The Fund notes your reservation of claims. The Trustees correspondingly reserve all claims and defenses, including the right to seek increased liability due to an earlier partial withdrawal or through use of PBGC or other alternative sets of actuarial assumptions, as a standard aspect of fiduciary duty.

Sincerely,

/s/ Charles J. Schaffer, Jr.
CHARLES J. SCHAFFER, JR.
Administrator
For the Trustees

cc: Kent Cprek, Esq.
Barry Willoughby, Esq.
James Peck, Jr.

APPENDIX E

AMERICAN ARBITRATION ASSOCIATION MULTIEMPLOYER PENSION PLAN WITHDRAWAL LIABILITY ARBITRATION

AAA Case No. 14 621 004 89Q

In the Matter of Arbitration Between

THE FLYING TIGER LINE, INC.
WARREN TRANSPORT, INC. and
TIGER INTERNATIONAL, INC.

and

TEAMSTERS PENSION TRUST FUND
OF PHILADELPHIA AND VICINITY

ARBITRATOR'S FINDINGS OPINION AND AWARD

INTRODUCTION

This arbitration was initiated pursuant to Section 4221 of the Employee Retirement Income Security Act ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MEPPA"), to review an assessment of withdrawal liability by the Teamsters Pension Trust Fund of Philadelphia and Vicinity (the "Fund") against Tiger International, Inc. and two of its subsidiaries, the Flying Tiger Line, Inc. and Warren Transport, Inc.[1]

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[1] In 1989, after the events involved in this dispute, Tiger International, Inc., with its then remaining subsidiaries, merged with the Federal Express Corporation. The surviving entity is named Federal Express Corporation.

The arbitrator was selected by the parties and the proceedings were conducted in accordance with the Multiemployer Pension Plan Arbitration Rules of the American Arbitration Association. After extensive pre-hearing discovery, arbitration hearings were held in Denver, Colorado on November 9, 1993, in Los Angeles, California on November 11 and 12, 1993, and in Wilmington, Delaware on November 18 and 19, 1993, at which testimony was taken and exhibits and discovery depositions received in evidence. Briefs and reply briefs were thereafter submitted by each party, followed by oral argument.

THE PARTIES AND PROCEDURAL HISTORY

This dispute arises out of the March, 1986, bankruptcy of Hall's Motor Transport Company, Inc. ("Hall's"). Prior to January, 1985, Hall's had been a wholly owned subsidiary of Tiger International, Inc. ("Tiger"). In that month Tiger sold 75% of Hall's stock.

Following its March, 1986, bankruptcy filing under Chapter 11, Hall's ceased or greatly reduced its contributions to a number of Teamsters multiemployer pension funds in which it had been participating, including the Teamsters Pension Fund of Philadelphia and Vicinity (the "Fund" or "Philadelphia Fund"). Soon thereafter, most of those multiemployer pension funds filed, or asserted they would file, proofs of claim in the Bankruptcy Court for withdrawal liability under MEPPA. Some expressly named Tiger as an "employer" and contended it was jointly and severally liable for the amount claimed. Eventually these claims for withdrawal liability totalled approximately $38 million.

In July, 1986, Tiger filed an action against various Teamsters pension funds, including the Philadelphia Fund, in U.S. District Court for the District of Delaware. Tiger sought a judicial declaration that it was not part of the Hall's controlled group at the time of withdrawal, challenged the constitutionality of certain aspects of MEPPA,

and requested injunctive relief against the assertion or enforcement of withdrawal liability claims.

In a counterclaim, the Philadelphia Fund alleged, among other things, that Tiger's January sale of 75% of Hall's stock was a transaction intended to evade or avoid withdrawal liability and should therefore be disregarded under Section 4212(c) of the statute.

On October 17, 1986, the District Court, partially vacating an earlier ruling, concluded that the determination of Tiger's status as an "employer", including the "evade or avoid" issue, must be resolved in arbitration. Consideration of the constitutional questions raised by Tiger was stayed until further order. *Flying Tiger Lines, Inc.* v. *Central States Pension Fund,* 659 F. Supp. 13, 7 EBC 2392 (D. Del 1986); see also 7 EBC 2385.

The District Court's decision was certified for interlocutory appeal, which resulted in affirmance by the Third Circuit. *Flying Tiger Line,* v. *Teamsters Pension Trust Fund,* 830 F. 2d 1241, 8 EBC 2505 (3rd Cir. 1987).

By the end of 1987, Hall's had ceased all contributions to the Philadelphia Fund, and by letter dated January 20, 1988, the Philadelphia Fund notified Tiger that a complete withdrawal by Halls' had been effected, thus giving rise to withdrawal liability. The Fund computed Hall's total withdrawal liability to be $2,100,228.40, and demand was made for quarterly payments in accordance with the statute.

The Philadelphia Fund stated that its determination of liabiilty was based on the theory that even if there had been a *bona fide* sale of Hall's stock by Tiger in January, 1985, Tiger continued to be liable for the portion of unamortized withdrawal liability incurred during the period of common control. This has been referred to as the Fund's "accrual theory" of liability. The Fund also stated that but for the accrual theory, it would have determined that Tiger was liable on the ground that its sale of Hall's

stock sale was an evasive transaction under Section 4212(c).

The foregoing events brought Tiger and the Philadelphia Fund back into District Court. In the meantime, in March, 1988, Tiger reached a settlement with all of the other multiemployer funds that had asserted withdrawal liability claims against it.

On February 6, 1989, the District Court determined that the dispute over both the "accrual theory" and the "evade or avoid" issue must be referred to arbitration. It ordered Tiger to begin making interim payments of withdrawal liability, and stayed further proceedings pending arbitration. *Flying Tiger Line, Inc.* v. *Central States Pension Fund,* 704 F. Supp. 1277, 10 EBC 1882 (D. Del. 1989).

By letter dated March 7, 1989, the Tiger Group submitted to the Fund its demand for arbitration of the withdrawal liability dispute. In a subsequent pre-hearing memorandum, Tiger cited the issues to be considered as the Fund's "evade or avoid" contention and its "accrual theory", as well as the Fund's determination of the amounts due. Thereafter, the undersigned arbitrator granted Tiger's motion to bifurcate the proceeding, reserving consideration of disputes relating to the calculation of the amount of withdrawal liability until after disposition of the question of whether Tiger has any liability at all. Discovery and hearings have since taken place, as outlined in the Introduction, and the question of Tiger's liability under either of the Fund's two theories is now ready for decision.

In view of the Third Circuit's decision in *United Retail & Wholesale Employees Teamsters Union Pension Fund* v. *Yahn & McDonnell, Inc.,* 787 F.2d 128 (3rd Cir. 1986), aff'd without opinion by an evenly divided Court, 481 U.S. 735 (1987), the hearings in this dispute proceeded on the assumption that the Fund had the burden

of proof, since the Third Circuit had held the statutory presumption in favor of plan sponsor determinations (Section 4221(a)(3)(A), 29 U.S.C. § 1401(a)(3)(A)) to be unconstitutional. However, after all evidence in the present case had been taken, the Supreme Court, in *Concrete Pipe and Products* v. *Construction Laborers Pension Trust,* 113 S.Ct. 2264 (1993), upheld the constitutionality of the statutory presumption, construing that provision "to place the burden on the employer to disprove a challenged factual determination by a preponderance" (*id.* at 2283). The parties were thereafter provided an opportunity to present oral argument on the application of that decision to the instant case. In deciding the issues in this dispute, I have applied the presumption as thus construed by the Supreme Court, but in no instance has resolution of an issue turned upon the allocation of the burden of proof.

STATEMENT OF FACTS

Hall's and the Tiger Companies

On the eve of deregulation of the trucking industry brought about by the Motor Carrier Act of 1980, Hall's was the twelfth largest motor common carrier in the United States, with 58 terminals, 3500 employees and more than 21,000 miles of authorized routes. Founded in 1922, Hall's had for many years contributed to various union-sponsored multiemployer pension plans, including the Philadelphia Fund, on behalf of covered employees.

In 1980, Tiger was a holding company which had operating subsidiaries in a variety of transportation services. The most significant was Flying Tiger Lines, Inc. ("Flying Tiger"), one of the world's largest all-cargo airlines. Tiger also owned North American Car Corporation ("North American"), a large rail car leasing company. Aviation services were rendered through Tiger Air, Inc. ("Tiger Air"), which was involved in the sale, charter and lease of aircraft, as well as providing aviation serv-

ices to the general aviation market. Through other subsidiaries, such as Tiger Leasing Group ("TLG") and National Equipment Rental ("NER"), Tiger was also active in computer and equipment leasing, as well as private mortgage insurance.

In late 1979 and early 1980, Tiger acquired Hall's for stock and $17 million in cash, for a total purchase price of approximately $45 million. During 1980 and 1981, Tiger acquired two additional trucking companies, Dohrn Transfer Company ("Dohrn") and Warren Transport Inc. ("Warren"). Warren was an owner-operated non-union company whose business was mainly providing full truckload service. Dohrn, like Hall's, was unionized and operated principally as a less-than-truckload (LTL) carrier. Tiger merged Dohrn into Hall's in 1981.

In acquiring the three trucking companies, Tiger evidently hoped that a certain synergy would result. For example, Flying Tiger often carried air cargo that originated or terminated in cities in which it had no terminal. In such cases it had to share shipping revenues with a freight forwarder. If the Tiger organization were able to handle the trucking portion of trip internally, those revenues could be kept within the organization. Moreover, by combining the regular traffic of the acquired trucking companies with the additional traffic that Flying Tiger coud book on them, the result would be to benefit both the trucking company and Flying Tiger.

During the first year of its acquisition by Tiger (1980), Hall's reported operating income of $9 million and net income of $2.9 million on revenues of $184 million. However, commencing in 1981, Hall's began experiencing net losses each year, and in 1982, began reporting operating losses each year. (Exs. 52, 60, 87.) The reasons appear to have included high labor and fuel costs, high interest rates on its debt, and other factors associated with a recession and deregulation of the trucking industry.

Initially, Hall's had been a source of cash for Tiger, with $11.5 million being transferred from Hall's to Tiger in 1980. After 1980, however, the net transfers were in the other direction, from Tiger or other Tiger subsidiaries to Hall's.

In terms of comparative size, Hall's revenues in 1982 represented about 12.5% of the revenues for all Tiger-owned companies.

Hall's Debt Restructuring

When Hall's was merged with Dohrn in 1981, the latter was not in compliance with certain covenants of its existing borrowing agreements. Tiger sought the consent of Dohrn's principal lenders to restructure those agreements.

When, by the end of 1982, Tiger and Dohrn's lenders, Prudential Insurance Co. ("Prudential") and Exchange National Bank of Chicago ("Exchange Bank"), had not been able to agree upon restructuring agreements, the two lenders declared defaults on outstanding borrowings of approximately $12.4 million and demanded payment. Subsequent discussions, however, resulted in a new arrangement being agreed upon in April, 1983, involving Prudential and Exchange Bank, as well as a new lender, Walter E. Heller & Co. ("Heller"). The restructuring debt was secured by Hall's accounts receivable and by liens on its rolling stock, although not on its real estate. It was a condition of the new arrangement that Hall's remain a wholly-owned subsidiary of Tiger, except that up to 11% of Hall's stock could be issued to employees.

Tiger's Financial Condition

The problems at Hall's were part of the larger financial problems facing Tiger and its other major subsidiaries. Economic conditions, including high interest rates, fuel costs and recession, resulted in Tiger losing money in 1981 and in succeeding years.

At the end of 1982 Tiger and several of is subsidiaries were experiencing cash shortages. On February 14, 1983, at a meeting with most of their principal secured lenders, Flying Tiger, North American, and certain other Tiger subsidiaries declared a debt moratorium on payment of principal and interest, and invited their lenders to negotiate new terms and payment schedules.

There followed, for most of the remainder of 1983, intensive and complex negotiations between Tiger and its subsidiaries and their various lenders. The restructuring agreements that resulted became significant with respect to subsequent events involving Hall's.

North American and TigerAir Restructuring

On September 8, 1983 North American and TigerAir executed restructuring agreements with most of their bank lenders, pursuant to which defaults on approximately $283 million and $62 million principal amounts of indebtedness, respectively, were waived. The North American agreement was amended and restated in December, 1983.

Under the TigerAir restructuring, substantially all of TigerAir's assets were pledged to its lenders and were to be sold over a period of years, with the proceeds of the sales paid to its creditors. By the end of 1983, TigerAir was accounted for as a discontinued operation.

In connection with the North American restructuring agreement, Tiger executed a promissory note (the "Tiger Note") in the principal amount of $132 million in favor of North American, representing advances previously made to Tiger by North American, and that Note was pledged to North American's lenders. The Tiger Note would not mature until 1991, but the maturity of the Note would be accelerated if, among other occurrences, there was a default under the North American restructuring agreement. As discussed below, such a default and acceleration did occur in 1984.

As part of the restructuring, North American's management operations were sold in 1983, and provisions made for the sale of its railcars. North American was accounted for as a discontinued operation as of the end of 1983.

The Flying Tiger Restructuring and the Override Agreement

In December 1983, Flying Tiger, Tiger's principal subsidiary, entered a restructuring agreement with substantially all of its private lenders. Under that agreement—known as the "Override Agreement"—defaults on approximately $588 million principal amount of indebtedness were waived or suspended, over $48 million principal and interest payments were deferred, and a new $45 million credit facility was negotiated. The agreement contained stringent financial convenants and Flying Tiger's obligations were secured by substantially all of its previously unencumbered assets.

The Override Agreement included a number of events of default, one of which would occur if "Aggregate Plan Liability" should exceed $5 million. That term was defined to include the sum of (a) unpaid liability for any terminating single-employer pension plan of any Flying Tiger affiliated company, plus (b) unpaid withdrawal liability demanded by a multiemployer pension plan from an affiliated company, plus (c) unpaid delinquent pension contributions demanded from an affiliated company. (Ex. 43., Sched. B and X.)[2]

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[2] Following MEPPA's adoption, Hall's potential withdrawal liability had been documented each year by Arthur Andersen, which served as outside auditor for both Hall's and Tiger, through correspondence with the various Teamsters pension funds. The total amount was reflected each year in notes to Hall's financial statements, as well as notes to Tiger's consolidated financial statements. Tiger's 1983 consolidated financial statements reported that multiemployer plan unfunded vested benefits could be approximately $36 million in 1982 and $33 million in 1983.

As was also the case under the earlier North American restructuring agreement, the Override Agreement limited the amounts of any cash advances from the subsidiary to Tiger. Any such advances from Flying Tiger and North American could be only for specified purposes and the amounts from each subsidiary had to be equal.

Continuing Problems at Hall's

Following the restructuring of Hall's debt in April, 1983, Hall's continued to suffer operating losses. Its situation was such that its auditors at Arthur Andersen decided to give a qualified opinion with respect to Hall's 1983 financial statements, as they had for 1982. The auditors noted that Hall's had sustained three consecutive years of losses (pre-tax losses of $8,385,000 in 1983, $12,708,000 in 1982, and $3,148,000 in 1981), and pointed to its consequent working capital deficits and declining net worth. A memorandum from one of the auditors stated that among the considerations leading to the qualified opinion was the overall condition of the motor carrier industry, adding in that connection that Hall's had not experienced the improvements in operations that some competitive companies in the industry had experienced in 1983. He also indicated that the concerns with regard to Hall's were in substantial part related to Tiger's own financial difficulties, stating:

> Perhaps the most significant consideration continues to be the weakened financial condition of the parent company. In 1983 Tiger again sustained substantial operating losses and was forced to partially divest its interest in North American Car Corporation, its rail and leasing subsidiary. While portions of its debt restructuring have been successfully completed, the financial condition of the parent continues to be tenuous and the 1983 auditors' report to be issued by our Los Angeles office will once more contain qualifying language similar to that suggested in SAS 34.

Ex. 51.

In March 1984, Wayne Hoffman, the Chairman and CEO of Tiger, asked his assistant, James Cronin, to evaluate the situation at Hall's. Up until this point Hall's had apparently been operating with relative autonomy from Tiger, particularly since Tiger's management had been so heavily occupied with the financial crises at its other subsidiaries (Cronin Hrg. 62). Cronin, who had no experience in the trucking industry but whose abilities were very highly regarded by Hoffman, had begun his tenure with Tiger in September 1980 as a planning analyst, and became manager of corporate planning a year later. He had most recently been serving as president of TigerAir and was responsible for overseeing the ongoing liquidation of that company's assets. After the events involved in the present dispute he would go on to become an officer of Flying Tiger and eventually, its President and Chief Operating Officer.[3]

Cronin proceeded to meet with Hall's management, review its financial reports, and consult with people knowledgeable about the trucking industry. He thereafter reported to Hoffman regarding his concerns about the Hall's operation, including the likelihood that it would experience liquidity problems, and suggested certain management changes as a first step toward improving the situation.

The upshot was that Hoffman asked Cronin to take over as President of Hall's—a position he assumed on June 7, 1984. Cronin and Hoffman both testified that Hoffman was optimistic that the Hall's situation could be turned around. He believed it to be a sound organization that could be returned to its former profitability if it had the right kind of leadership and could cut its costs. Cronin

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[3] Cronin was one of three former Tiger officials to present hearing testimony in this proceeding. The others were Wayne Hoffman, Tiger's Chairman and Chief Executive Officer, and Robert Harter, Tiger's General Counsel at the time of these events. None of the three have had any employment connection with the successor company or its subsidiaries since 1989.

also testified that although he had just bought a house in the Los Angeles area, where Tiger was located, he moved his family to Mechanicsburg, Pennsylvania, Hall's headquarters, and made a commitment to Hoffman that he would remain there for three years.

Cronin stated that he found disagreement and in-fighting among Hall's senior managers regarding the nature of its problems and the solutions to them, and he made some changes among those managers. He concluded that management needed to learn how better to compete in the new environment that trucking deregulation had brought about, and he also believed there were significant deficiencies in the way the company developed and reported financial, service and operational data.

Through the end of September, 1984, Hall's incurred an operating loss of $5.5 million, compared to an operating loss for the same period in 1983 of $5 million (Ex. 88, p. 2). Nevertheless, Cronin testified that he felt some progress had been made with respect to the problems he had identified, but he was also concerned that by the first quarter of 1985 additional capital would be needed. The ability or willingness of Tiger to provide the necessary funds was questionable, and existing lenders seemed unwilling to advance further monies. Cronin also stated that Hall's competitors made effective use with potential customers of the fact that the financial difficulties of Tiger and its various subsidiaries had been so frequently in the news. The reputation for financial instability that surrounded Tiger resulted in competitive disadvantage to Hall's, he explained, since shippers worry about a carrier's financial problems that might result in their goods being tied up in bankruptcy proceedings or left at loading docks.

Cronin pointed out that Hall's labor costs were a significant element in its lack of profitability, and that those costs represented a higher percentage of its revenues and expenses than was true of its principal competitors. Ac-

cordingly, he looked into the possiblity of securing wage concessions in return for an ESOP, and in that regard spoke with an ESOP consultant and with Teamsters officials. As discussed more fully below, Cronin came to the conclusion that it would be difficult to obtain such concessions as long as Tiger owned Hall's.

On October 5, 1984, Cronin met with John Lafferty, the Arthur Andersen engagement partner for the Hall's account to discuss the current operating situation at Hall's and the outlook for the future. Lafferty's memorandum of the meeting referred to Cronin's efforts regarding the ESOP. The memorandum also recorded Cronin's view that Hall's could not continue to operate the way it had been, but must make some important strategic decisions as to the type of carrier it would be in the future. Cronin also stated that he and Tiger management were considering various alternatives for Hall's, including an outright sale, a joint venture arrangement with another entity, a restructuring and contraction of the company, or a capital infusion by Tiger in an amount sufficient to get Hall's through the next year to permit continued emphasis on revenue and yield enhancement programs. Lafferty further noted that Cronin had made several references to Hall's potential withdrawal liability, and commented that Cronin and Tiger "have focused on this as a real obstacle to doing something with Hall's" (Ex. 56).

Hall's Engages Alex. Brown

By letter dated November 1, 1984, and signed by Cronin November 6, 1984, Alex. Brown & Sons, Inc.—an investment banking firm with trucking industry experience —was engaged to assist in finding either a purchaser or investor for Hall's. Although the terms of the engagement indicated that consideration would be given to a variety of arrangements—including "merger, acquisition or investment" (Ex. 69, p. 1)—the Alex. Brown reperesentatives handling the engagement seem to have focused entirely on

obtaining a purchaser for Hall's (Bannister Dep. 46-48; Legg Dep. 44).

The engagement was for a six-month term with automatic month-to-month renewals thereafter. However, Hall's provided Alex. Brown with an incentive to complete its work promptly. Under the fee arrangement Alex. Brown would receive two and a half times the basic fee for delivering an offer, acceptable as to its key terms, by December 31, 1984, and twice the basic fee if such an offer were delivered by January 31, 1985. In explaining the reason for the incentive, Cronin testified:

> Whenever you are selling a company, there is an issue of what happens both to the morale of your employees and your customer base. And so what I was concerned about was that if we were going to do anything, whether it was a sale, combination with somebody, that it be done on a quick basis.
>
> Subsequent to that letter, there are other events that took place that put even more premium on the timing issue. But you don't want to make public and you don't want to have a long, drawn-out process, because again, that becomes a significant competitive disadvantage in the service business . . . [and] in terms of retaining your people. [Cronin Hrg. 102]

North American Car Bankruptcy

The "other events" referred to by Cronin which added urgency to the matter had to do with North American Car and the interrelated restructured debt arrangements, previously described, involving the various Tiger companies.

On November 2, 1984, Tiger was advised by certain lenders of their belief that a net worth default had occurred as of September 30, 1984, under the North American debt restructuring agreement. On December 5, 1984, North American filed a voluntary Chapter 11 bankruptcy peti-

tion as part of an effort to work out a new arrangement with its lenders.

The impact of this event on Tiger included the fact that it accelerated Tiger's liability on the $132 million Tiger Note (see *supra* at 10) which was pledged by North American to its lenders as security (Ex. 61, p. 16). In addition, it meant that no more funds could be upstreamed to Tiger from North American, and consequently, by virtue of the Override Agreement, no further cash advances could be made from Flying Tiger. The latter had just recently turned the corner to profitability and had become Tiger's principal source of funds. The result, in turn, was that Tiger would be severely constrained in making any further cash advances to Hall's.

As part of a settlement with North American lenders holding the Tiger Note as collateral, Tiger agreed to a public sale in early 1985 of convertible preferred stock, most of the proceeds of which were to be used for payment of interest and principal on the Tiger Note.

As discussed more fully below, the consequences of the North American bankruptcy left Tiger particularly desirous of finding a purchaser for Hall's by the end of 1984. The major considerations appear to have been (1) the constraints that now existed upon the further use of Flying Tiger as a source of cash, and (2) the forthcoming public stock offering and the S-1 registration statement that would be filed in connection with that offering.

Alex. Brown's Efforts and the Lee Offer

Shortly after its engagement, Alex. Brown mailed a selling memorandum to a number of potential purchasers on November 13, 1984 (Exs. 81, 83). The memorandum described Hall's business and operations, and set forth its recent history of losses. Alex. Brown also reported, however, that "Hall's has a strong balance sheet, with $28

million in equity, modest debt and an estimated $15 million in unused borrowing capacity" (Ex. 81, p. 2). The memorandum included a list of Hall's real estate and reported an estimated fair market value of $6 million more than book value. Alex. Brown also indicated that Hall's had tax loss carry forwards and investment tax credit carry forwards of $15 million and $2.2 million, respectively. In addition, the memorandum addressed withdrawal liability, noting that Hall's had an estimated liability under MEPPA of $35 million which could be triggered if Hall's should withdraw from a plan or liquidate operations.

Several recipients of the memorandum responded with expressions of interest in further evaluating Hall's. One of the early respondents to the memorandum was a man with trucking company ownership background named Whit Lee. Alex. Brown scheduled a meeting on December 12, 1984 between Lee and Cronin and other Tiger representatives. As described by Cronin, Lee proposed at the meeting a purchase of all of Hall's stock for $10 to $15 million and a forgiveness of its intercompany debt to Tiger (which debt amounted to some $12 million). Cronin's reaction to this proposal was that it was "less than I had hoped for but [I] was prepared to continue to see if we could make it work" (Cronin Dep. 452).

It appears that during this meeting Lee and his associate, LeGrand Price, learned that Tiger was anxious to close the transaction by year end (Price Dep. 8; Lee Dep. 39-46). Price's notes of the meeting contain such references as "want deal cut before S-1" and "want to close not letter of intent" (Ex. 254). Two days later, in light of this information, Lee sent Cronin a new proposal. He suggested closing the transaction on or before December 31, 1984, but offered to pay only $1,000 in cash for all of Hall's stock. He also offered to leave in place Hall's debt to Tiger up to $10.5 million, and to secure that debt. The transaction would be subject either to the consent of the existing lenders, or to a refinancing of the debt of any non-

consenting lenders (Ex. 256). On December 17, Lee's counsel sent to Cronin and counsel a draft stock purchase agreement with the same terms as those outlined in Lee's December 14 letter (Ex. 257).

On December 19, 1984 there was a meeting to discuss Lee's latest proposal, attended by Lee, Cronin and Alvin Bodford, Hall's chief financial officer. Also present were representatives of Hal's lenders, whose consent was necessary to any sale of Hall's. The lenders made it clear that they would not approve any transaction that involved a significant amout of money going to Tiger rather than being put into Hall's or paid back to lenders (Cronin Hrg. 116; Walsh Dep. 108-9).

Lee discussed his past successes in turning around other companies in the trucking industry, and outlined his plan to do the same with Hall's. This included obtaining an ESOP and wage concessions from the Union, certain productivity improvements, and other measures. He explained that he saw a need for $5 million in cash to get Hall's through the January-March, 1985 period, until the foregoing measures could be put in place. To the surprise of those in attendance, however, he also stated that he did not expect to put any new working capital of his own into the company. In what he later described as a "negotiating tactic" (Lee Dep. 74), Lee explained that his risk would be the assumption of a $38 million unsecured and unfunded liability arising from the company's pension plan. Lee suggested that the necessary $5 million could come from a combination of money from the existing lenders and the sale of some unencumbered real estate (Ex. 105).

The Bodford Offer

After Lee had made his offer, Bodford saw an opportunity to acquire Hall's for himself and other members of Hall's management, and he thereupon offered to match Lee's proposal. Bodford, who had been chief financial

officer of Hall's since 1981, and had prior trucking company experience in financial and accounting positions, had obviously wanted to lead Hall's for some time. In the Spring of 1984 he had told Cronin that he, Bodford, should be appointed as CEO of Hall's, and shortly thereafter (apparently during the Summer of 1984) proposed to lead a buyout of Hall's—a proposal that was rejected at the time (Bodford Dep. 44; Cronin Hrg. 123-4).[4]

The lenders rather quickly decided that Bodford was their preferred purchaser over Lee. Not only was Bodford and his management group a known commodity to the lenders as compared to Lee (Walsh Dep. 102), but Heller's reprepresentatives, in particular, were concerned over Lee's statements that on prior occasions he had used bankruptcy filings to force the renegotiation of union contracts (Willming Dep. 41-43; Walsh Dep. 102-03; Lee Dep. 83). Heller soon concluded that it did not want to deal further with Lee (Ex. 105), and in the ensuing days both Heller and Alex Brown apparently ignored further overtures from Lee (Lee Dep. 211-17, 237-38).

After the December 19 meeting, Bodford discussed his buyout proposal with other members of Hall's management, and described their response as positive (Bodford Dep. 86-87). Negotiations between Bodford, Tiger, and the lenders continued throughout much of the remainder of December.

The proposed transaction that finally emerged from these meetings provided for Bodford and other senior members of Hall's management to form a corporation, Hall's Acquisition Corporation ("HAC"), that would purchase 75% of Hall's stock from Tiger. HAC would pay Tiger $1,000 in cash and Tiger would receive a

[4] That earlier proposal, which would involve some other investors along with Bodford. was conditioned on Tiger first getting an ESOP in place. Cronin testified that the offer was rejected because it was thought to be unlikely that Union agreement to an ESOP could be secured as long as Tiger owned Hall's, and if in fact Tiger were able to do so, it would not then want to sell the Company (Cronin Dep. 440-45; Bodford Dep. 81-85).

secured note for $10.5 million of the existing intercompany debt, such security to be subordinated to that of the lenders. Tiger would retain a 25% interest in Hall's and would have the right to name one director to the Hall's board. Tiger would pay the costs of closing the transaction (including Alex. Brown's fee), amounting to some $1 million, and would continue for up to one year its existing guarantees of certain of Hall's self-insured workers' compensation obligations. Tiger retained the right to cancel the sale if $5 million in new financing promised by Heller were not forthcoming by January 31, 1985. The purchaser would agree to cause Hall's to continue contributing to the various pension plans, and at substantially the same levels, as Hall's had contributed in the past.

With respect to the lenders, Heller would agree to lend up to an additional $5 million in return for a first lien on all unencumbered real estate and rolling stock, and would receive warrants which could be exercised to obtain a 12½% interest in Hall's. Although not putting up any additional money, Exchange Bank and Prudential, in return for their consent to the transaction, would receive second liens on all unencumbered real estate and rolling stock to secure their existing loans.

By memorandum dated December 27, 1984 to Wayne Hoffman, Tiger's Chairman and CEO, Cronin outlined the proposed transaction and summarized its advantages and disadvantages (Ex. 41). Those were stated as follows:

Advantages

1. Eliminates forecasted cash infusion of $5 million into Hall's for the first quarter of 1985, as high as $15 million for all of 1985.

2. Note [for $10.5 million of intercompany debt] is secured with hard assets; annual cash interest of $1.55 million to Tiger.

3. Includes existing lender support.
4. Existing lenders provide adequate liquidity to enable Hall's to institute ESOP.
5. Reduces impact of Tiger's condition on Hall's future operations.
6. Eliminates remaining Tiger subsidiary operating at a loss, improving 1985 Tiger outlook.
7. Defines disclosure requirements for pending public offering.
8. Tiger retains residual interest in future value of Hall's.

Disadvantages

1. Loss of approximately $17.5 million on Tiger's investment in Hall's and associated negative impact on Tiger equity.
2. Requires approximately $1 million in cash to cover closing costs and fees.
3. Does not completely eliminate contingent risks.

Cronin added that "although the loss on Tiger's investment is significant, given Hall's 1985 earnings risk (loss of $10-$12 million) and cash requirements without the ESOP and the market risk of the ESOP," he recommended proceeding with the proposed transaction (Ex. 41 at 3).

The Tiger Board of Directors approved the transaction in a telephone meeting held on December 31, 1984, in which six directors, including former President Gerald Ford, participated, and in which this transaction was the only item of business. The Board's resolution sets forth the following reasons for management's recommendation of the transaction:

> [T]he transaction will provide an immediate cash infusion from outside sources for Hall's; will elim-

> inate the need for continued cash contributions by the Company to Hall's; will permit the Company to obtain the necessary lender consents to the granting by Hall's to the Company of liens and security interests in certain real and personal property under the Security Agreements to secure the obligations of Hall's to the Company; will enable Hall's to enhance its liquidity by borrowing up to an additional $5,000,000 from Heller; will assist Hall's in the implementation of its business plan, including the proposed implementation of an Employee Stock Ownership Plan which should result in a significant reduction in Hall's labor expenses; will permit the Company to retain an equity interest in Hall's to realize a portion of the appreciation in value of Hall's which will result from the foregoing.

(Ex, 31 at 4).

After a further week of negotiations and drafting of documents the transaction closed on January 7, 1985. Three weeks later the $5 million commitment was funded by Heller and the transaction was no longer contingent. Stock representing a 75% interest in Hall's was released from escrow to HAC.

In a letter to Cronin dated January 24, 1985, Alex. Brown endorsed the transaction, and provided a summary of its reasons. These included the infusion of new financing to enable Hall's to implement its business plan and the apparent unwillingness of creditors to lend while Hall's was under Tiger control; the improved prospects for securing an ESOP with Hall's being separated from Tiger; the better prospects Hall's would have with shippers if separated from Tiger's widely reported financial difficulties; and the fact that the transaction provided for continuity of management. The letter also stated: "In addition, based on our discussions, it appeared vital to Tiger's proposed public financing that Hall's be disposed of." (Ex. 82)

Post-Transaction Events

The day after acquiring Hall's, January 8, 1985, Bodford issued a press release announcing the closing. It stated:

> The acquisition, strongly supported by Hall's lenders, firmly positions the 60-year old, $195 million common carrier to meet its financial commitments and to continue the further developments of its operations . . . [Bodford] also announced that all existing management and the management structure will remain unchanged.

Ex. 178.

The next day Bodford met with John Lafferty, the Arthur Andersen partner in charge of the Hall's account. Lafferty recorded in his notes of the meeting Bodford's positive view of Hall's prospects. Lafferty noted that Bodford had told him:

> [T]he negotiations took significantly longer than anticipated and there were numerous changes required along the way, however, he was quite happy with the final outcome and very optimistic about the future. . . . The conversation was very upbeat.

Ex. 179.

The Bodford-led management adopted a recovery plan that contemplated the establishment of a 15% wage reduction ESOP, a review of all terminal operations with the intent to improve or discontinue those with negative cash flow, examination of asset redeployment opportunities, and aggressive reduction in corporate and field overheads (Ex. 158).

Immediately following the acquisition, negotiations were initiated with the Teamsters for the establishment of an ESOP, and the outcome was announced in a press release on May 6, 1985 (Ex. 183). The ESOP would give the employees up to 40% of the firm's stock in

exchange for 15% wage reductions over the next 5½ years. Total savings to the company were estimated at $77 million, and were to be used to reduce the long-term debt, purchase new trucks and equipment, and upgrade the firm's computer system. The release quoted Bodford as saying:

> Approval of the ESOP was an enormous vote of confidence for management and the employees," Bodford said of the vote. "At the meetings I told them we can be the Chrysler of the trucking industry, and I think we can. We have a positive net worth, a sound distributing system of over 69 terminals in 19 states and Washington, D.C., Canada and a loyal customer base.

The release also announced that Hall's had reported an operating profit for the fourth accounting period of the year.

Notwithstanding the foregoing, difficulties were soon developing. On February 15, 1985, a notice to employees announced that Ed Driscoll, vice president of operations, had resigned "due to differences in management philosophies." The notice also announced that Bob Cashman, who had been serving as senior vice president of marketing, had also left. (Ex. 180) Bob Wallace, who had worked for Bodford for many years, left the company as well. (Bodford Dep. 142-44). With their departures only two of the five that Heller and Tiger considered to be the Hall's management team remained, Ron Hall and Tom Fraticelli.

Retention by Hall's of a consultant named Jerry Buccino, a turnaround specialist, had been urged by Heller in connection with its approval of the transaction. By May, Buccino was also gone. (Cronin Hrg. 122-23; Bodford Dep. 106-08; Willming Dep. 47-48; Ex. 114 at 3.) Heller would note in a subsequent letter to Bodford that had "Heller known that substantially all of the manage-

ment team that was to have participated in the management buyout of Hall's would leave the Company in 1985, it is highly unlikely that Heller would have financed the buyout transaction" (Ex. 114; Willming Dep. 98-100, 132-37).

Overall, the Company's performance in 1985 proved to be far short of what had been projected. For several years prior to the sale, Hall's annual revenues had held relatively steady, in the range of $190 to $193 million for the years 1982 through 1984 (Exs. 52, 87). In contrast, by the end of 1985, Hall's operating revenues had dropped to approximately $160 million (Exs. 331, 114). During that year, Hall's market share declined 25% (Ex. 114 at 4).

In mid-November, 1985, Bodford contacted Tiger—which had never exercised its right to place a director on the Hall's board of directors—detailing the financial difficulties Hall's was now having and the severe cash shortage it was facing. He requested that Tiger give up its 25% interest in Hall's, as well as its lien on Hall's assets which secured the $10.5 million obligation from Hall's to Tiger. His explanation for the requests was that he felt that in view of efforts he was putting forth to make the company successful he should have a 100% stake in the company, and, moreover, that he was not able to obtain essential additional financing as long as Tiger held a security interest in Hall's assets. (Ex. 326; Harter Hrg. 14, 18).

When Tiger balked at giving up its 25% share of Hall's stock, Bodford threatened that he would take action to redeem the 75% interest that HAC held in Hall's, with the result that Tiger would again be the sole shareholder in Hall's. He pointed out that Tiger would then become liable for Hall's MEPPA withdrawal liability if Hall's should fail.

In an agreement adopted on December 13, 1985 (Ex. 8), Tiger agreed to relinquish its 25% share in Hall's—

an agreement made, according to Robert Harter, Tiger's general counsel who represented Tiger in the matter, "because of MEPPA" and because "we didn't want to put him in the position where he could cause us to own this company, which was now in dire financial straits" (Harter Hrg. 32-33).

Tiger also agreed that it would give up its security interest in the $10.5 million debt, provided that it was necessary in order for Hall's to secure additional financing and provided also that Hall's furnish Tiger with financial projections to demonstrate the uses to be made of the additional financing.

However, Hall's was unsuccessful in obtaining additional funds from existing or new lenders, and filed a Chapter 11 bankruptcy petition on March 10, 1986. Thereafter, Hall's began to reduce, and eventually, by the end of 1987, to cease, its contributions to the various Teamster pensioan funds in which its had been participating, as outlined earlier in this Opinion.

CONTENTIONS OF THE PARTIES

The Fund's Contentions

The Fund contends that in considering whether Section 4212(c) applies to a transaction, the inquiry should be whether a principal purpose of the party claiming the benefit of the transaction was to evade or avoid withdrawal liability. In the present case, that party is Tiger, and its evasive purpose, says the Fund, is demonstrated by an objecive appraisal of the business advantages and disadvantages of the transaction, as well as by several explicit "smoking gun" memoranda and other testimony. The transaction makes business sense, in the Fund's view, only if Tiger either believed Hall's failure and the consequent assessment of withdrawal liability to be "nearly imminent" (Brief at 119), or wanted to avoid having to disclose in the forthcoming registration statement the

impact that withdrawal liability might have upon Tiger and its other subsidiaries.

An assessment of the transaction was also provided by the Fund's expert witness, John E. Hempstead, head of a financial consulting firm which specializes in business valuation and realty matters, including advice on mergers and acquisitions. Mr. Hempstead concluded that a principal purpose of the transfer by Tiger of its equity in Hall's was to avoid having to disclose in its forthcoming registration statement the impact that a potential assessment of withdrawal liability could have.

The Fund asserts that the most striking feature of the sale of Hall's is that for only $1,000 in cash, and with Tiger bearing $1 million in transaction costs, Tiger transferred 75% of the stock of a company in which it had invested some $50 million since 1980, and which had almost $200 million in annual revenue. The price reflects both a steep discount for the potential triggering of withdrawal liability in the near future, as well as the magnified effect of triggering an event of default under the Override and related agreements. The efforts to sell Hall's were concerned with avoiding the effects of withdrawal liability, rather than trying to realize the supposed going concern value of Hall's, and the transaction offered Tiger no value other than taking Hall's potential withdrawal liability off its hands.

The Fund argues that the consent of Hall's lenders to the sale does not reflect any belief on their part in the viability of Hall's, since they were given secured positions in the company's real estate assets which covered both new advances and pre-existing loans. The fact that this additional security could be attacked as a preference under 11 U.S.C. § 547 in the event of a bankruptcy within 90 days (or within one year if the lenders were considered as "insiders"), explains Heller's unwillingness to approve a sale to Lee, given the latter's comments about bankruptcy as a means of forcing labor concessions.

Moreover, Bodford's undertaking to purchase Hall's does not necessarily reflect a belief on his part in the company's viability, since he had nothing to lose beyond his $1,000, and everything to gain in the event of a Hall's turnaround.

The Fund also contends that liquidation of Hall's would have been a more attractive alternative than the sale for $1,000, were it not for the withdrawal liability consideration. It asserts that absent withdrawal liability Hall's had a liquidation value of over $16 million.

A particular reason for the effort to dispose of Hall's by December 31, 1984, in the view of the Fund and its expert witness, was to avoid disclosing Hall's potential withdrawal liability and its consequences as an event of default under the Flying Tiger Override Agreement, in the S-1 registration statement to be filed on February 14, 1985 in connection with the upcoming public stock offering.

The Fund and its expert take issue with the reasons advanced in Cronin's memorandum of December 27, 1984, as supporting the sale to Bodford (*supra* at 23), and contend that each of the supposed benefits to Tiger of the transaction could have been achieved without selling Hall's when it did.

A number of other aspects of the transaction are pointed to by the Fund as evidence of Tiger's improper motive. It cites, *e.g.*, the Board of Directors approval of the sale, which was accomplished in a telephone conference call with no analysis provided to the directors as to the fairness of the sale nor any opinion from Alex. Brown.

The Fund also cites the condition in the transfer agreement—referred to by its expert as "the string"—which allowed Tiger to undo the transaction unless Heller agreed to provide Hall's with an additional $5 million in financing by January 31, 1985. In the Funds' view this indicated a concern that Hall's not sink too soon, thereby creating a problem of preference in the granting of collateral.

Tiger's post-transaction refusal to appoint a director to the Hall's board—as it was entitled to do under the sales agreement—shows, in the Fund's view, that it did not believe that its remaining 25% interest had any value. The Fund also cites the fact that in December 1985 Tiger gave away to Bodford its remaining 25 interest in order to avoid withdrawal liability.

The Fund in addition places particular emphasis on a series of "smoking gun" documents, which it believes convincingly establish Tiger's evasive purpose.

One of these "smoking guns" is the memo by John Lafferty concerning his October 6, 1984 meeting with James Cronin (*supra* at 15) in which Lafferty had noted Cronin's references to withdrawal liability and had concluded that Cronin and Tiger "have focused on this as a real obstacle to doing something with Hall's." Lafferty's memo also noted that Cronin had discussed a recent tender offer (reported in the trade press) by Time-DC for Transcon and that Cronin had suggested the offer might have been motivated by multiemployer pension liability.

A second "smoking gun" is the set of notes made by LeGrand Price (*supra* at 19) in which Price referred to Tiger's desire to close the transaction by year-end; the notes also contain a reference to "MEPA."

The third "smoking gun" is a memorandum by Donald Goffman of Exchange Bank, describing the December 19, 1984 meeting between the lenders, Whit Lee and James Cronin (*supra* at 20-21). The smoking item in the memorandum, in the Fund's view, is the reference to Lee's statement, in explaining why he would not put any money into the company, that "his risk would be the assumption of a $38 million unsecured and unfunded liability arising from the company's pension plan."

The fourth "smoking gun" is Exhibit 58, an internal memorandum by Martin Imm of Prudential, who could not recall the source of the information. The memorandum states, in part:

> Recent problems at Tiger International have led to its decision to precipitously sell 75% of its interest in Hall's to its management for a nominal amount. Tiger plans to file a registration statement for some debt it is proposing to issue in the near future. By selling its control this weekend, prior to the filing of the registration statement, Tiger will avoid disclosing the large potential liability Tiger might face under Hall's multi-employer union contract if Hall's should fail and will also avoid documenting the present operating problems at Hall's which could be damaging to its customer relations.

This memorandum particularly supports, in the Fund's view, its argument that the most plausible explanation for the sale of Hall's was Tiger's reluctance to disclose in its forthcoming registration statement the impact that an assessment of withdrawal liability against Hall's would have on other Tiger companies.

The Fund's contentions in support of its alternative "accrual theory" of liability are outlined in the discussion *infra*, of that issue.

Tiger's Contentions

Tiger argues that legislative history and applicable decisions, including *Dorn's Transportation* v. *Teamsters Pension Trust Fund*, 787 F. 2d 897 (3rd Cir. 1986), indicate that Section 4212(c) applies only to sham transactions involving bad faith or collusion between the parties.

In the present case, Tiger asserts, there is no evidence of collusion between Tiger and Bodford in connection with the purchase of Hall's. Bodford's relationship with Cronin had, in fact, been adversarial since Cronin arrived as president of Hall's, as Bodford felt that he should be president and had, moreover, made an effort to undertake a purchase of the company at that time. In December, 1984, Bodford picked up on the offer that had been

made by Whit Lee, after the bankers made clear they would not approve of Lee. Moreover, the terms of the purchase by the Bodford-led management group were the subject of extensive negotiations prior to the closing.

In addition, Bodford's post-closing conduct provides no hint of collusion. On the contrary, when Bodford found Hall's again in difficulty about a year after the purchase, he pressured Tiger to give up its 25% equity share and to further subordinate the collateral securing its $10.5 million note, thus further demonstrating the adversarial arm's-length relationship between Bodford and Tiger.

Tiger also argues that the transaction made economic sense for Tiger and, as Cronin, Hoffman and Harter all testified, would have occurred eevn if there were not contingent MEPPA liability.

It points out that Tiger had been going through a restructuring of over a billion dollars in debt, and in late 1984 Hall's was Tiger's last operating subsidiary that was still experiencing losses. If the losses continued at the rate of $8 to $9 million a year (the 1983 and 1984 figures), its shareholder equity would be near zero and there would be no chance to recover the $10 to $12 million that Hall's owed Tiger. The sale gave Hall's a better chance of obtaining the funds necessary to buy financial breathing space and to implement the ESOP which could make Hall's profitable. It would also free Hall's from the negative Tiger association in the minds of customers. In these circumstances Tiger could collect on the $10.5 million note, avoid the immediate need to pump another $5 million into Hall's, and stand a chance to realize some value on its 25% remaining stake.

Citing *Chicago Truck Drivers Pension Fund* v. *Louis Zahn Drug Co.*, 890 F.2d 1405 (7th Cir. 1989), Tiger contends that its disposition of a money-losing operation, and its structuring of the transaction so as not to trigger a withdrawal do not establish that it has acted to evade

or avoid withdrawal liability within the meaning of Section 4212(c).

Moreover, the record demonstrates that while there was certainly knowledge of Hall's potential exposure under MEPPA, there was little evidence of awareness on the part of Cronin, Hoffman, or even Tiger's auditors, of the other Tiger companies' exposure under MEPPA for Hall's contingent withdrawal liability. Thus, although Hall's contingent MEPPA liability had been footnoted in Hall's financial statements for 1981, 1982, and 1983, as well as in Tiger's consolidated financial statements for those years, the separate 10-K financial reports for Flying Tiger made no reference to Hall's contingent withdrawal liability—thereby indicating that neither Tiger management nor Arthur Andersen were focused on the implications of controlled group liability under MEPPA. The Arthur Andersen engagement partner in fact testified that the auditors had not focused on the possibility that Hall's contingent withdrawal liability might also be a contingent liability of Flying Tiger or Tiger "because we have not viewed it as relating to anybody but Hall's" (Lafferty Hrg. 230-31).

Tiger takes note of the argument made by the Fund and its expert witness that the sale of Hall's at the end of 1984 was particularly driven by Tiger's desire to avoid having to disclose in its February 14, 1985 offering statement the fact that an assertion of withdrawal liability against Hall's might create a default under the Flying Tiger Override Agreement and the consequences for Tiger should such a default occur. It points out that prior 10-K filings for Flying Tiger had contained no such disclosure, nor had any such disclosure been contained in a public offering preliminary prospetus filed by Tiger as recently as November 19, 1984. Rather, the financial statements contained in the November 19, 1984 prospectus merely referred to the contingent MEPPA liability in virtually the same as Tiger's prior consolidated financial state-

ments had done and, indeed, as the financial statements provided in the subsequent February 14, 1985 public offering document did.

With respect to the Fund's emphasis on the so-called "smoking guns", Tiger argues:

(1) The Lafferty memo (Ex. 56) contains no suggestion that Cronin, or even Lafferty, was aware that a withdrawal by Hall's would visit liability upon other Tiger companies, and, as noted above, the financial reports prepared by Arthur Andersen—the auditors for both Tiger and Hall's—gave no indication of a contingent MEPPA liability for Tiger companies other than Hall's. Moreover, the TIME-DC/Transcon transaction referred to in the Lafferty memo has no parallel to the Hall's situation. It involved a threatened tender offer by TIME-DC for Transcon—a much larger company contributing to the same multi-employer plan—in hopes of forcing Transcon to purchase TIME-DC. In such a situation, TIME-DC could apparenty shut down operations without triggering MEPPA's partial withdrawal provisions.

(2) LeGrand Price's notes (Ex. 254) indicate only that Lee and Price, as prospective purchasers, had MEPPA in mind, but contain nothing to indicate that Tiger's desire to close by year-end was for the purpose of evading or avoiding MEPPA liability.

(3) With respect to the Goffman memorandum (Ex. 105), the fact that Lee stated, in a meeting with Cronin and the lenders, that he would be assuming an unfunded pension liability does not in any way suggest that *Tiger's* purpose in selling was to evade or avoid withdrawal liability.

(4) As for the Martin Imm memorandum (Ex. 58), there is no evidence that it memorializes any conversation with a Tiger representative, as the Fund claims. In his deposition, Imm could not remember any meeting with

Tiger representatives, and his assistant, Brandon Walsh, could not remember which Tiger official had confirmed this information to him. Moreover, Tiger argues, even if it wanted a contingent liability off its consolidated balance sheet sooner rather than later, this does not mean that a principal purpose of the transaction was to evade or avoid withdrawal liability.

Tiger's position that the sale of Hall's was not for the purpose of evading or avoiding withdrawal liability was supported by the testimony of its expert witness, Peter D. Linneman, a professor at the Wharton School of Business, whose teaching and outside consulting work relates primarily to mergers and acquisitions and the financing, valuing and structuring of business and real estate transactions. Dr. Linneman testified to his conclusion that the sale of Hall's appeared to have occurred for standard, legitimate business reasons.

He explained that one of the most typical reasons why subsidiaries are sold is because the parent does not have some combination of wherewithal in terms of money and managerial commitment to see a troubled subsidiary through the parent's troubled period, and its appears this was the case here.

Linneman stated that it is common for LBOs to involve little equity from the buyer, and in his experince it almost invariably happens that existing lenders will require the buyer-borrower to enhance their secured positions. It is also common for the seller to retain a minority equity position in order to realize the upside potential of the company being sold. He pointed out that LBOs normally involve an element of risk, and the fact that one fails does not mean that at the time the transaction was structured the parties knew or should have known that it would fail.

Linneman testified that as a money-losing company Hall's had very little equity value to Tiger at the end of

1984, and from that standpoint Tiger received fair value for its interest in the company. What was significant was not the $1,000 consideration paid by Bodford, but the fact that Tiger would no longer have to commit its management energies, its cash and its borrowing capacity to Hall's; it received a secured commitment for payment of $10.5 million of intercompany debt; and it would still participate in any improvement in the company's fortunes. In that regard, Linneman stated that he believed Hall's to have been a viable company, provided it achieved certain changes—the main one being instituting an ESOP, with accompanying wage concessions on the order of 15%.

In view of the foregoing considerations he believed that it was reasonable for Cronin to have concluded—wholly apart from withdrawal liability considerations—that it was in Tiger's best interests to sell Hall's, rather than for Tiger to attempt to turn Hall's around itself, with the consequent expenditure of cash and managerial resources that would have involved. He also believed that Cronin could reasonably have concluded that the transaction which he undertook was preferable to a more orderly sale. Orderly sale efforts can often be protracted and time-consuming, and the attendant uncertainties may erode employee morale and customer loyalty. In the meantime, in a situation like the present one, additional cash is being put into the business to keep it going while a potentially higher-paying buyer is being sought. Linneman also concluded that Cronin, based upon his own experience in liquidating TigerAir's assets, could readily have believed that a liquidation of Hall's would not have yielded enough money to cover its debts, and, therefore, that the transaction with Bodford made the most sense.

DISCUSSION

v. *The Evade or Avoid Issue*

A. Section 4212(c) of the Act, 29 U.S.C. § 1392(c), provides as follows:

> If a principal purpose of any transaction is to evade or evade liability under this part [i.e. §§ 4201 through 4225], this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

Judging at least from the reported decisions, it appears that this provision has seldom been invoked and, with one exception, has never been held applicable.[5]

The Third Circuit—the circuit in which the present case arises—addressed Section 4212(c) in *Dorn's Transportation* v. *Teamsters Pension Trust Fund*, 787 F. 2d 897 (3rd Cir. 1986), and concluded that in the context of the sale of business, a transaction has as its principal purpose the evasion of withdrawal liability within the meaning of the statute only if *both* parties to the transaction share that purpose.

In *Dorn's* the purchaser was found not to be aware of the seller's potential withdrawal liability; consequently, the

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[5] Claims by multiemployer pension funds under Section 4212(c) were rejected in *Dorn's Transportation* v. *Teamsters Pension Trust Fund*, 787 F.2d 897 (3rd Cir. 1986); *Chicago Truck Drivers Pension Fund* v. *Louis Zahn Drug Co.*, 890 F. 2d 1405 (7th Cir. 1989); *Teamsters Pension Trust Fund of Philadelphia* v. *Fuqua Industries, Inc.*, 15 EBC 2271 (E.D. Pa. 1992), aff'd without opinion, 981 F.2d 1248 (3d Cir. 1992); *Cuyamaca Meats, Inc.* v. *San Diego & Imperial Counties Butchers Pension Fund*, 638 F.Supp. 885 (S.D. Cal. 1986), aff'd 827 F.2d 491 (9th Cir. 1987), cert. den. 485 U.S. 1008; *ITU Pension Plan and Fort Worth Star Telegram*, 5 EBC 1193 (Mittelman, Arb., 1984). The one reported decision upholding the application of Section 4212(c), *Banner Industries, Inc. and Central States Pension Fund*, 11 EBC 1149 (Graham, Arb., 1989), was thereafter vacated and the opinion withdrawn, 12 EBC 1992 (1990).

purchaser could not be said to have entered into the transaction in order to evade liability. Noting that "we are not dealing with a transaction in which *both* buyer and seller conspired to reduce payments or liability to a pension plan" (787 F.2d at 902, emphasis the Court's), the Court stated:

> It may be that Walter Dorn [the seller] entered into the transaction with Oneida [the buyer] in order to escape withdrawal liability . . . However, where the seller enters a transaction to escape liability, but the buyer has no intention of taking subsequent actions that will reduce the payments owing to the Plan, it does not appear that a 'principal purpose of the transaction' as a whole is to escape liability.

It thus appears that the Court viewed Section 4212(c) as applying, at least in transfer of business transactions, only to efforts to escape withdrawal liability through collusive or sham arrangements.[6]

The point is important here because whatever purposes Tiger might have had in selling Hall's—and those purposes are considered at length below—the Bodford-led HAC clearly did not have any purpose of evading or avoiding

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[6] While the statutory language might well support a more expansive reading, other courts have also read the provision narrowly. See *Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers Pension Fund, supra*, where the court rejected a fund's assertion that the employer's timing of a withdrawal so as to minimize liability warranted application of Section 4212(c), stating:

> Even assuming that a principal purpose was to reduce withdrawal liability, the legislative history of Section [4212(c)], sparse as it appears to be, indicates that this proposal was not one Congress intended the provision to cover . . . . [The legislative history] suggests that Section [4212(c)] was directed at essentially fraudulent maneuvers lacking in economic substance.

638 F.Supp. at 889-90.

withdrawal liability in purchasing the company, nor does the fund seriously so contend.

In the first place, although Bodford was a member of Hall's senior management group, in no sense was he acting at the behest of Tiger or in collusion with Tiger in acquiring the company. He was a man who earlier in 1984 had felt that Tiger should have made him president of Hall's, instead of Cronin, and he had subsequently, during the Summer of 1984, made an unsuccessful effort to purchase Hall's with the involvement of some other investors. He ended up acquiring Hall's after it appeared that Whit Lee might succeed in acquiring the company with his low-cash offer on December 19, 1984; at that point Bodford quickly decided to match Lee's offer and the lenders concluded that Bodford was their preferred candidate.

As chief financial officer of Hall's, Bodford was aware of Hall's potential withdrawal liability exposure, but there is no evidence that he believed at the time that Tiger was selling Hall's in order to evade withdrawal liability. His own testimony was that he thought Tiger was selling in order to concentrate on its other companies (Bodford Dep. 153), and, as discussed more fully below, his testimony also indicated that he believed there were good reasons why Hall's would have a greater chance of success if it were *not* owned by Tiger (see *infra* at 53, 56-58).

It also seems clear that Bodford had every intention of returning Hall's to profitability, and continuing its multiemployer fund contributions. Of course, his *bona fides* in this regard might be questionable if his expectations were objectively unreasonable and it were clear that Hall's failure was inevitable. The Fund essentially so argues, and the argument finds support in the fact that Hall's did indeed file in bankruptcy a little over a year following its acquisition by Bodford. Nonetheless, the evidence indicates to me that as of late 1984 there were reasonable

grounds for believing that Hall's, despite having lost money for several years, could be made profitable once again.

It is pertinent to note in this connection, that although Alex. Brown's offering memorandum had fully disclosed Hall's recent financial problems, expressions of interest were nonetheless received from at least three potential purchasers, in addition to Whit Lee (Ex. 83). Alex. Brown itself had apparently indicated an interest in investing in Hall's if Cronin would stay on as president (Cronin Dep. 405-06, 448-51). Whit Lee, who had had experience with troubled trucking companies, had an active interest in acquiring Hall's and was still attempting to raise money to take out the existing lenders when the sale to Bodford was closed (Lee Dep. 211-17, 237-38).

Moreover, the lenders—particularly Heller, which put more money into Hall's at the time of Bodford's purchase—evidently believed that Hall's could succeed. They, like others who considered the matter, were clearly of the view that in light of Hall's disproportionately high labor costs, the key element for success was to obtain substantial wage concessions in return for an ESOP. That this was a basic feature of Bodford's proposed plan for Hall's was particularly noted by Martin Imm of Prudential in describing the transaction in an internal memorandum (Ex. 58, at 2), and he testified that it was Prudential's expectation that with an ESOP in place Hall's could go from a loss to a profitable operation (Imm Dep. 57). Heller, for its part, made the securing of an ESOP by June 1985 a condition of its loan (Ex. 103).[7]

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[7] The Fund dismisses the lenders' assessment of Hall' prospects on the basis that they had obtained security interests in Hall's assets and were thus protected against a failure of the company. Undoubtedly the security served to temper the lenders' anxieties, but it is common experience that even secured lenders are not normally indifferent to a borrower's ability to repay. As Mr. Willming of Heller pointed out, there is no assurance that the security will be adequate when the time comes, and the lender may still have to contend with the uncertainties of the bankruptcy process in attempting to recover (Willming Dep. 137-38).

The two expert witnesses who testified in this proceeding also discussed the favorable prospects—viewed as of late 1984—for a profitable Hall's if an ESOP were to be obtained.

Professor Linneman gave as his opinion that "there were clear steps that the new purchasers, Mr. Bodford and his group, had in mind that gave it a real chance at viability; namely they had a number of operating ideas, but the main one was . . . instituting an ESOP . . ." (Linneman Hrg. 291). He explained that viewing the Hall's situation in 1984, the most likely place to find potentially large earnings improvement was on the cost side, and since labor costs—amounting to $130 to $135 million—represented almost 70% of all costs, the reduction of those costs through an ESOP became the obvious factor to look to. An ESOP that brought 15% labor costs savings, he pointed out, assuming that other factors remained the same, had the potential for turning 1984's $8.5 million loss into annual earnings of some $11 million (Linneman Hrg. 281-85; Ex. 299). Since the new owners appeared more likely to achieve an ESOP of significant magnitude, and relatively quickly, than might be achieved by Tiger, Professor Linneman concluded that as of December 1984, there was "a very substantial likelihood"—greater than 50%—that Hall's would turn around and produce many millions of dollars of value (Linneman Hrg. 174-77).[8]

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[8] As pointed out in the Statement of Facts, Hall's did succeed in obtaining agreement to 15% wage concessions in return for an ESOP within a few months after the the Bodford-led acquisition. The reasons why the Company nonetheless failed—including the causes of the sharp drop it experienced in revenues ($160 million in 1985, compared to $190-$194 million in 1982 through 1984)—are not at all clear on this record, although the fact that some of Hall's key management left shortly after the acquisition appears to be regarded as at least a significant contributor to the Company's problems in 1985 (Ex. 114; Linnenman Dep. 177-78).

Nor did Mr. Hempstead, the Fund's expert, indicate that Hall's demise was inevitable. On the contrary, while expressing the opinion (discussed *infra*, at 62-63) that Tiger sold Hall's to avoid having to disclose the potential impact of a withdrawal liability assessment, Mr. Hempstead testified that a credible case could be made "that if one were to stay the course with Hall's that it eventually would become a valuable company, a profitable company again" (Hempstead Hrg. 22). He pointed out that "[t]he potential savings, labor costs savings envisioned by an ESOP were large. . . . There was a lot to be gained by an ESOP. A lot of upside potential. And if I were advising Tiger, I would advise them to give it the old college try, it's certainly worth doing, and try hard to get the ESOP consummated" (Hempstead Hrg. 38).

It should be added that notwithstanding some assertion by the Fund to the contrary, Bodford does not appear to have been an implausible leader of the buyout group. He brough to the effort substantial background as a financial executive with Hall's as well as with other trucking companies. Although there was testimony that Heller was concerned about his lack of experience in operations and marketing, and wanted to ensure that he had support in those areas (Cronin Dep. 468-69), he was evidently regarded by the lenders as a known commodity (Walsh Dep. 102) and clearly preferred as a purchaser to Whit Lee.[9]

Bodford's expectation that Hall's could be turned around and his commitment to that effort would, of course, be more solidly confirmed had he put more of his own money into the purchase. The fact that he had only

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[9] The Arthur Andersen auditors noted in an internal memorandum during 1985 that "Hall's key management, particularly Al Bodford, has extensive industry background. We view the strong financial orientation and background of Hall's management as favorable factors in the Hall's business environment" (Ex. 345 at 3).

$1,000 of his own funds at risk—he testified that he had offered to put up his house as additional collateral but was not asked to do so by the lenders (Bodford Dep. 154)—offers at least some support to the Fund's assertion that he simly agreed to take Hall's off Tiger's hands without any significant belief in its viability. Thus, the limited extent of Bodford's personal investment is certainly a factor to consider, but as one of the experts pointed out, LBOs typically involve very little equity from the purchaser (Linneman Hrg. 272).

In any event, in view of the other circumstances that have been discussed herein, I find that Bodford was not acting in furtherance of any purpose to evade or avoid withdrawal liability, and instead that he had a good faith expectation that Hall's could be continued as a viable enterprise and as an ongoing contributor to its various multiemployer funds. Accordingly, I conclude that under the *Dorn's* decision, a principal purpose of the sale of Hall's was not to evade or avoid withdrawal liability within the meaning of Section 4212(c).

The Fund has advanced several arguments for the proposition that the ruling in *Dorn's* is not applicable here. It points out *e.g.*, that the Third Circuit has subsequently referred to the "unusual circumstances" of *Dorn's* and the narrowness of its holding. See *Flying Tiger, supra,* 830 F.2d at 1252, 1253, notes 16 and 19; *Colteryahn Dairy, Inc.* v. *Western Pennsylvania Teamsters & Employers Pension Fund,* 847 F.2d 113, 123, n. 17 (3d Cir. 1988). However, those references clearly apply to the holding in *Dorn's* allowing arbitration to be bypassed, and not to its ruling as to the meaning of Section 4212(c).

The Fund also argues that on Tiger's prior appeal to the Third Circuit in this case, the Court, even on the limited record then before it, noted that there was good reason to believe that the sale of Hall's was not *bona fide.*

The Fund cites note 21 of the Third Circuit's *Flying Tiger* opinion (830 F.2d at 1254), which refers to an affidavit by a Central States Fund attorney quoting Bodford as stating that a principal purpose of the transfer of Hall's was to evade or avoid withdrawal liability. That affidavit was not introduced as evidence in this arbitration, and Bodford himself did not testify to that effect.

The Fund also argues that the *Dorn's* decision is distinguishable because the transaction at issue there was not the sale of Dorn's but rather Oneida's professed intention to continue making contributions on behalf of its employees. I don't believe the two cases can be distinguished on that basis. In the earlier case Dorn's had shut down its terminal and had discontinued contributions under its collective bargaining agreement. Unless the sale of the business to Oneida was *bona fide*, withdrawal liability would have been triggered at that point. Thus, the inquiry in that case, just as in the present case, was whether a principal purpose of the sale of the business was to evade or avoid withdrawal liability.

In sum, I do not believe the factual differences between *Dorn's* and the present case renders that decision inapplicable here. For the reasons stated, I conclude that Bodford as purchaser did not have as a purpose to evade or avoid withdrawal liability nor to enable the seller to do so, and, accordingly, that under the principle stated in *Dorn's* the transaction is not invalid under Section 4212 (c).

B. Notwithstanding the foregoing conclusion, I recognize that the Fund has based its case mainly on the proposition that despite the language of the *Dorn's* decision, it is the seller's purpose alone that is controlling in the present circumstances. Accordingly, in view of the prospect of further review of this matter based on that position, I believe it appropriate to consider the evidence bearing on Tiger's purpose in selling Hall's.

It seems undeniable that Tiger sought to dispose of Hall's, at least in substantial part, because Hall's had for several years been losing money, and Tiger was becoming increasingly hard-pressed to provide the funds it would need. As the Third Circuit has recently observed, "Disposing of an unprofitable operation is a legitimate business purpose." See *Pension Benefit Guaranty Corp.* v. *White Consolidated Industries*, 998 F.2d 1192, 1202 (3rd Cir. 1993), quoting *Chicago Truck Drivers, Helpers & Warehouse Workers Pension Fund* v. *Louis Zahn Drug Co.*, 890 F.2d 1405, 1412 (7th Cir. 1989): "(transaction 'designed to relieve [a party] of a part of its busines that was producing significant losses' is a bona fide sale)." [10] The question therefore presented by the Fund's argument is whether evasion or avoidance of liability was nevertheless a principal purpose of Tiger's action.

Probably the most striking aspect of this transaction is not that Tiger decided to sell Hall's, but rather that the completion of a sale was put on a fast track which foreclosed a further effort to achieve more favorable terms from other potential purchasers. By proceeding with Bodford as it did, Tiger precluded consideration of any improved offer from Whit Lee who—although clearly rejected by at least one of the existing lenders—was at least purportedly still attempting to line up financing to take out the existing lenders, and also left unexplored expressions of interest from several other prospects who had responded to the Alex. Brown memorandum.

The Fund argues that these circumstances can be explained only by Tiger's desire to avoid incurring with-

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[10] The *White Consolidated Industries* case arose in connection with the evasion of liability provision applicable to terminated single-employer plans (ERISA § 4069(a), 29 U.S.C. § 1369(a)), with somewhat different wording from MEPPA's "evade or avoid" provision. It applies when "a principal purpose *of any person* in entering into any transaction is to evade liability . . . ." (emphasis supplied).

drawal liability, or at least having to disclose to investors the consequences that would follow from the assessment of such liability. Tiger, on the other hand, contends that the sale and the haste that attended it were attributable to valid business reasons without reference to withdrawal liability considerations.

It should be noted that when Alex. Brown was engaged in early November, 1984, to find a buyer or other type of investor for Hall's, there was a demonstrated desire for some dispatch in accomplishing the assignment, but certainly no mandate that it be completed by year end. Thus, as an incentive for prompt action, the basic fee was to be increased to 250% for delivery of an offer, acceptable as to its key terms, by December 31, 1984, and to 200% if such an offer were delivered by January 31, 1985. However, the engagement was for a six-month term with automatic month-to-month renewal thereafter, and Alex. Brown was entitled to a fee as long as it made good faith efforts—even if unsuccessful—during the term of the agreement.

What chiefly occurred to hasten Tiger's desire to sell Hall's was the bankruptcy of North American in early December 1984, which had two pertinent effects. One was that it foreclosed Tiger from using either North American or Flying Tiger as further sources of cash to support Hall's ongoing operations. This occurred at a time when it was becoming increasingly apparent that an infusion of cash would be needed by Hall's in early 1985. In addition, the bankruptcy led to Tiger's agreement with North American's creditors to raise funds through an offering of convertible preferred stock, with a registration statement to be filed on February 14, 1985. The success of that public offering was critical to Tiger's future, and it is clear, no matter whose version of motivation is accepted, that the public offering had at least a major bearing on the sudden urgency to sell Hall's.

In assessing Tiger's purposes in entering into this transaction I first consider the reasons Tiger has given for selling Hall's at all, as well as its reasons for ultimately doing so on a hurried basis.

If Tiger believed, as its witnesses testified, that Hall's could be turned around and made once again profitable, an obvious question is why Tiger did not undertake to do so on its own. Tiger has several answers. One has to do with the conclusion, discussed above, that an essential key to turning Hall's around, in view of its high labor costs, was to secure Union agreement to significant wage concessions in return for an ESOP—a device that had been pursued by some others in the trucking industry.

Tiger contends that it would have been difficult to obtain Union agreement to an ESOP arrangement as long as Hall's was owned by Tiger. Cronin testified that he had met with an ESOP consultant, as well as with Jackie Presser, the then president of the Teamsters and two of his lieutenants. The reaction he got was that Presser would not help with the ESOP. Cronin also stated that it was difficult to explain either to the Union or to rank and file employees why a large parent like Tiger could not continue putting money into Hall's. (Cronin Dep. 407, 445-46, 505-06.) Hoffman also testified that it became apparent that it was going to be difficult for Tiger to negotiate a contract with the union on the ESOP issue, since the Union had an attitude that Tiger was a deep pocket and it was therefore unwilling to negotiate wage concessions. (Hoffman Hrg. 35-36.)

From a non-Tiger perspective, Bodford testified similarly. He stated there was "no real question" that it would be difficult to get Teamsters approval for an ESOP while Tiger owned Hall's—a view he got mainly from the Hall's representative who negotiated with the Teamsters. He stated his belief that the Union would be concerned that Tiger, rather than Hall's, would receive the benefit of the

savings from the wage concessions (Bodford Dep. 232-33). Bodford also noted that even during ESOP negotiations with the Teamsters following the transfer of Hall's, the Union expressed concern about accepting a wage cut if payments were going to be made on the $10.5 million note to Tiger (Bodford Dep. 199).

In addition, one of the Alex. Brown representatives testified to having discussions as to the feasibility of securing an ESOP under Tiger's ownership, and concluding "that the existence of a corporate parent would make it more difficult to persuade the Teamsters that the company needed to substantially reduce costs." He added his impression "that there was a high level of suspicion of non-transportation, non-trucking corporate parents who owned trucking companies on the part of the Teamsters." (Bannister Dep. 61-2).

The Fund argues that the concern over achieving an ESOP as long as Tiger owned Hall's was not a valid consideration in Tiger's decision to sell Hall's. It points to the fact that Cronin and Bodford gave slightly different explanations of the Union's supposed objections, thereby suggesting, apparently, that neither could be valid. The Fund also contends that Cronin's and Hoffman's testimony that the union regarded Tiger as a "deep pocket" is inconsistent with their testimony, discussed below, that customers and lenders regarded Tiger's ownership as a disadvantage to Hall's.

I do not find the Fund's arguments in this regard to be at all convincing. That Cronin and Hoffman described the Union's objections in terms of a perception that Tiger could continue putting money into Hall's does not seem to me at all inconsistent with Bodford's reference to a Union concern that Tiger would reap the benefits of any wage concessions. The two notions seem to me to go together quite readily. Similarly, I don't have any difficulty in accepting that the Union and its rank and file may have

been viewing Tiger and its relationship to Hall's through a different prism than Hall's customers and lenders may have. The simple fact is that unions and their members are normally most reluctant to accept substantial wage concessions, and its stands to reason that the difficulty of that process is likely to be exacerbated when the employer seeking the concessions is part of a much larger aggregation of corporate enterprises.

The Fund argues, in addition, that it was never actually found to be impossible for Hall's to secure an ESOP under Tiger ownership, and moreover, that there was no real effort to pursue an ESOP until after the decision to sell Hall's had already been made. On the latter score, it appears that Cronin's meeting with the ESOP consultant occurred on October 7 and 17, 1984, several weeks prior to the engagement of Alex. Brown. It is not clear just when Cronin met with Teamsters officials, but there seems to be little doubt that he had reason to conclude that an ESOP would be difficult to secure prior to the December 1984 period when it was decided to move quickly on the sale of Hall's.

Accordingly, I am persuaded that the difficulties of securing an agreement to an ESOP and wage concessions so long as Tiger owned Hall's was a real factor in Tiger's decision to sell. This is particularly so when a protracted delay in attempting to overcome those difficulties would mean continuing losses at Hall's until such time as efforts to convince the Union and its members might succeed. And if a lengthy effort had been made and had failed, the prospects would at that point undoubtedly seem entirely discouraging to any potential buyer.

Another reason stated by Tiger for selling Hall's was that Tiger's well-publicized financial difficulties over an extended period of time were damaging to Hall's. As Harter observed, it was as if "a troubled company" were part of Tiger International's name, since the Company's

name never appeared in print without those words appended (Harter Hrg. 138-39). Both Hoffman and Cronin testified that competitors were using such information against Hall's in soliciting business. Cronin explained that shippers are highly sensitive to reports of financial instability since they are concerned that their shipments might be tied up in bankruptcy proceedings or left at loading docks, and also worry that the carrier may not be able to satisfy damage claims. (Hoffman Hrg. 35; Cronin Hrg. 68-69, Cronin Dep. 396). The North American bankruptcy again resulted in negative press reports concerning continuing Tiger problems which competitors laid at Hall's doorstep (Cronin Hrg. 105; Hoffman Hrg. 36). Bodford also testified that Tiger's financial difficulties produced a negative image for Hall's and that sales representatives for competitors cited those difficulties in persuading shippers not to use Hall's (Bodford Dep. 169-71).

The Fund derides what it describes as this "Tiger as albatross" theory, and, with the support of its expert witness, contends that under Tiger ownership Hall's presumably had the advantage of receiving business by virtue of its intermodal shipping arrangements with Flying Tiger (Hempstead Hrg. 39). It notes, moreover, that Hall's in fact lost business following its sale by Tiger. It appears, however, that the intermodal shipping strategy had not been much of a success (Walsh Dep. 96; Legg Dep. 45; Bannister Dep. 44), and there is no evidence to suggest that the post-transaction sales decline was at all attributable to the severance of the Tiger affiliation. On the other hand the testimony by Cronin, Hoffman and Bodford to the uses made by competitors of Tiger's financial difficulties seems to me entirely plausible and I credit the evidence that this was a factor in Tiger's conclusion that Hall's had a greater chance of becoming profitable outside of Tiger ownership.[11]

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[11] It is in any event clear that Tiger did not concoct this testimony for purposes of this arbitration. Brandon Walsh of Pruden-

A further reason cited by Tiger as favoring a sale was that Hall's was in need of additional operating monies, at least until such time as an ESOP could be instituted, that Tiger had limited ability to furnish such funds, particularly so after the North American bankruptcy, and that existing lenders were unwilling to extend further credit to Hall's as long as it was owned by Tiger. Cronin's testimony includes a number of references to the lenders rebuffing his overtures, including his statement that in late December, 1984, it was clear that Heller was not prepared to advance additional funds to Hall's under the existing agreement and felt strongly that before putting more funds into Hall's there needed to be a change in ownership. (Cronin Hrg. 119, 199; Cronin Dep. 363, 521.) Bodford, who as Hall's chief financial officer had been dealing regularly with the lenders, also stated his understanding that the lenders did not want to advance additional funds as long as Tiger was in control and wished to see Tiger out of the picture. (Bodford Dep. 149-51.)

The testimony from the lenders on this question is not all that clear. Walsh, a Prudential representative, testified that he thought ownership by Tiger was a plus from the creditors' point of view, but less so by December 1984 (Walsh Dep. 104). On the other hand, Willming, the Heller representative, could not recall if Heller had a view one way or the other on the desirability of Tiger's continuing ownership, nor could he recall if Heller had a view on providing additional lending if Tiger remained in control. (Willming Dep. 52-54, 95, 132). Moreover, it does not appear that Tiger had specifically explored the prospect of securing further loans in return for additional security in Hall's real estate, as Bodford subsequently

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tial testified that Hall's management had at the time voiced concern over the difficulties that Tiger's publicly disclosed financial difficulties were causing, although he stated that the lenders felt that Hall's own financial condition was the greater problem (Walsh Dep. 105-6).

provided. Nonetheless, in a letter dated January 28, 1986, Willming stated that in late 1984 Tiger had informally sought additional credit accommodations for Hall's and was declined (Ex. 114 at 3).

Based on the testimony and the last-cited document, I conclude that Tiger had in fact made some requests for further credit for Hall's and had been turned down, leaving it with a reasonable expectation of lender unwillingness to provide such additional monies.

Recognition of the need to obtain wage concessions in return for an ESOP as a key ingredient for returning Hall's to profitability and the perceived difficulty of securing Teamsters agreement to such concessions as long as Hall's was owned by Tiger; the belief that competitors were taking business from Hall's by exploiting the negative image created by Tiger's widely-publicized financial difficulties; and the fact that Hall's was losing money and would need further cash infusions which Tiger was hard-pressed to provide and banks were reluctant to lend, thus represent the basic reasons advanced by Tiger for deciding to sell Hall's. I find these to be entirely plausible and valid reasons.

To this mix was added the urgency created by the North American bankruptcy in early December 1984. In the first place, just when it was becoming increasingly clear that Hall's would need further cash advances in early 1985, the North American bankruptcy precluded funds from being advanced from Flying Tiger, which had been the most likely source for such monies. According to Hoffman's and Cronin's testimony, cash could have been obtained if necessary from Warren Transport, which was not subject to the same constraints as Flying Tiger and North American (Hoffman Hrg. 39, 45, 80-81, 108; Cronin Hrg. 169, 198), but this appears to have been regarded as a last resort.

The constraint on the advancement of further funds to Hall's provides an understandable reason for Tiger to hasten the process of finding a buyer, but it is not clear that it actually required a December 31 target date. That appears to have been driven by the upcoming public offering of preferred stock. By disposing of Hall's by December 31, 1984, Tiger was able to state (and did so in the February 14, 1985 registration statement, Ex. 45) that all of its unprofitable subsidiaries were now discontinued operations.

It is true, as the Fund argues, that Hall's could be treated for accounting purposes as a discontinued operation even if not yet sold, as long as a decision had been made that it would be sold within a reasonable period of time. However, as both Cronin and Hoffman testified, the advantage of having already closed the sale is that it simplified the disclosure and eliminated the elements of conjecture that might otherwise surround Hall's. As Cronin noted, if Hall's had not been sold there would be a need to discuss the problems that had led to the decision to discontinue, and to explain the alternatives being considered for its disposition, and until it was actually sold there would be the prospect of further discontinued operation losses to report.

Cronin stated that one of the criticisms that Tiger had encountered in the capital marketplace was that its prior explanations of restructurings had become too much of an ongoing story, with new problems to report each year in connection with subsidiaries whose difficulties had supposedly been resolved. Indeed, the fact that North American had been treated as a discontinued operation a year earlier did not prevent it from now presenting Tiger with a major problem. Accordingly, if it were possible to state in the forthcoming registration statement exactly what had been done with Hall's, and to identify a specific gain or loss on the sale, there was a strong preference for doing so (Hoffman Hrg. 52, 107; Cronin Hrg. 108-110; Cronin

Dep. 455-459.) Professor Linneman also testified to his opinion that discussion of Hall's operating problems would have presented potential investors with a significant concern (Linneman Dep. 203-05).

In the Fund's view, these explanations have no real validity, and it offers two alternative explanations for the transaction. One is that since Tiger sold Hall's to Bodford while there was still outstanding expressions of interest from other prospective purchasers, "[t]he sale to Bodford only makes business sense if Tiger believed Hall's failure was nearly inevitable and Tiger wanted to avoid withdrawal liability." Fund Brief at 119.

As previously discussed, however, Tiger and others who assessed the situation, including the lenders and both experts who testified in this arbitration, were of the view that Hall's had a reasonable prospect of again becoming profitable, provided that certain changes—notably, the etsablishment of an ESOP—were made. Moreover, even apart from the favorable prospects for a turnaround, there was certainly no inevitability that Hall's would fail within such a short time frame as to explain Tiger's desire to close the sale by year end. It is true that Hall's was expected to require additional cash for its operations in the early part of 1985; it is also clear that the effect of the North American bankruptcy had made it far more difficult for Tiger to provide that cash. Nonetheless, both Hoffman and Cronin testified that if it were necessary, additional funds could still have been obtained from Warren (a profitable Tiger subsidiary), or even that Warren could have been sold, in order to keep Hall's going.

Thus, it does not at all appear that the inevitability of imminent collapse is what motivated Tiger to pass up further consideration of other prospective purchasers in favor of selling to Bodford by year end. If, in fact, Tiger's motive had been to avoid the withdrawal liability that would result from Hall's collapse, it would nonetheless have been able to keep Hall's going at least long enough

to further explore the possibilities of a more advantageous offer from Whit Lee or the others who had responded to the Alex. Brown offering memorandum.

The Fund's other—and rather different—explanation for Tiger's desire to sell Hall's by year end is that Tiger wanted to avoid having to disclose in the forthcoming registration statement just what impact the assertion of withdrawal liability against Hall's might have upon Tiger.

It should be noted in this regard that the potential withdrawal liability had been footnoted in Tiger's consolidated financial statements since 1981. And, since Tiger's consolidated financial statements for the nine-month period ending September 30, 1984 were included in the February 14, 1985 registration statement, the potential withdrawal liability was likewise footnoted in that registration statement, as follows:

> Based on the limited information provided, the management believes Tiger's share of unfunded vested retirement benefits for multi-employer plans for certain company union employees could be approximately $33,000,000 in 1983 and $36,000,000 in 1982.

Ex. 45, at F-26.

However, there is an additional disclosure that the Fund argues that Tiger wanted to avoid, and it relates to the fact that the Override Agreement (the agreement reached with Flying Tiger's creditors in December 1983) had included, among its numerous events of default, any assertion of pension liability—including withdrawal liability—of more than $5 million against any affiliated company (see *supra* at 11). Consequently, if withdrawal liability were to be assessed against Hall's, a large amount of Flying Tiger debt would, at the option of its creditors, become due and payable. The result would be either to put Flying Tiger into bankruptcy, or at least greatly reduce the value of its stock, a portion of which was going

to be used as collateral for the restructured Tiger note to North American's creditors.

The Fund argues, and Mr. Hempstead testified, that the relationship between an assertion of withdrawal liability against Hall's, and its impact upon Flying Tiger and consequently upon Tiger, would have to be disclosed under applicable provisions of the Securities Act, since there was a substantial likelihood that a reasonable investor would consider such a matter important in deciding whether to purchase the security being offered. The Fund further argues that if the registration statement ware actually to make such a disclosure, there would be a chilling effect on the public offering for preferred stock. In this respect, Mr. Hempstead testified, the potential impact of a withdrawal liability assessment was "the 300 lb. gorilla" that made Tiger's stated reasons for the transaction pale in significance (Hempstead Hrg. 16-17).

Although Mr. Hempstead thought that disclosure of the relationship between the Override Agreement and an assessment of withdrawal liability against Hall's would have a chilling effect on potential investors, and, consequently, must have been of predominant concern to Tiger, Professor Linneman had a contrary view. While he agreed that as a potential investor he would want to know about the relationship between the Override Agreement and withdrawal liability, it was his opinion that the primary concern for investors would have been Hall's operating problems—discussion of which Tiger avoided in the registration statement by selling Hall's. In his view, the contingent withdrawal liability issue would have been a very secondary consideration. (Linneman Dep. 165, 203-05).

One reaction that I have to the Fund's argument is that I doubt that the point is as significant as the Fund contends. When a party has decided to dispose of a business for valid reasons, the timing of that disposition in order to avoid, not an assessment of withdrawal liability, but

simply the need to discuss in a registration statement the adverse consequences that would follow if such liability were to be asserted, does not seem to me to turn that party's primary purpose into one of evading or avoiding withdrawal liability.

Moreover, to address the factual question, it does not appear that those responsible for preparing the registration statement were aware of any need to provide a discussion of the relationship between Flying Tiger's Override Agreement and an assessment of withdrawal liability against Hall's, even assuming the correctness of Mr. Hempstead's views regarding the importance of such information. Not only did Tiger's general counsel, Robert Harter, who was involved in preparation of the registration statement, deny that consideration of such a disclosure was involved, but it is clear that prior SEC filings by Tiger, which on the same theory should likewise have contained such a disclosure, did not do so. Thus, although Hall's had been a troubled company since 1982, and in that sense was at least a potential candidate for imposition of withdrawal liability, Flying Tiger's 10-K annual report for 1983 (Ex. 343) made no mention of the fact that an assertion of withdrawal liability against Hall's could make Flying Tiger's recently restructured debt immediately due and payable. It, indeed, did not mention, Hall's or its potential withdrawal liability at all, even though, as a member of the same controlled group, this was a potential liability of Flying Tiger's as well as Hall's.

Likewise, a preliminary prospectus filed with the SEC on November 19, 1984 (Ex. 335), covering a proposed public offering of securities of both Tiger and Flying Tiger, did not refer to the consequences that might flow, under the Override Agreement or otherwise, from an assertion of withdrawal liability against Hall's, although, as with the February 14, 1985 registration statement, the consolidated financial statements for Tiger footnoted the fact

that a contingent withdrawal liability existed (Ex. 335, at F-26).[12] Moreover, the February 14, 1985 registration statement contained no discussion of the many other events of default to which the Override Agreement was subject or the significance of their assertion, other than to note that the restructuring agreements contained strict financial and other covenants (Ex. 45, at 13-14).[13]

The Fund nonetheless argues that Tiger was well aware of the connection between withdrawal liability at Hall's and the potential acceleration of Flying Tiger's restructured debt. It points out that Tiger's 10-K for 1985 (prepared in March, 1986) made the very type of disclosure that it claims Tiger was trying to avoid making prior to the public offering in early 1985—*i.e.*, that if Tiger were held liable for Hall's withdrawal liability, Flying Tiger might be deemed in default under its restructuring agreements, thereby accelerating the entire principal

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[12] The wording of the disclosure that was made in the February 14, 1985 registration statement provides some further indication that Tiger did not have such a focused concern about withdrawal liability as the Fund assumes. The disclosure, quoted *supra* at 62, is worded as if the potential withdrawal liability was Tiger's. There is no mention of the fact—which Tiger certainly could have stated—that the liability was attributable to Hall's and was transferred along with the sale of that Company.

[13] To put the matter in some further context, it is evident that through various complex debt restructuring agreements, the Tiger companies were subject to an impressive array of events of default, many of them having nothing to do with failure to make timely payments of principal or interest. Insofar as disclosure is concerned, a review of the 10-Ks and other filings in this record indicates that there was no practice of discussing potential events of default or their possible consequences, but only those that had actually occurred, and of which Tiger was aware. It also appears that when such defaults occurred, Tiger normally assumed that they would be waived or that lenders would at least refrain from accelerating the debt or exercising other creditors' remedies—as indeed appears to have been the case under the Override Agreement when withdrawal liability claims were made following Hall's failure.

and interest due under those agreements. Ex. 11 at 39. What is significant about that disclosure, however, is that it was reporting the fact that Hall's had filed in bank ruptcy on March 10, 1986, and at least one pension fund had declared that Hall's had withdrawn and was threatening to hold Tiger responsible for the liability. This was thus a much different situation than that which existed in late 1984, and in my view does not demonstrate that Tiger would at that time have seen a need to discuss in the forthcoming registration statement the relationship between withdrawal liability and the Override Agreement.

Consideration must also be given to the Fund's fourth "smoking gun"—the December 29, 1984 internal memorandum by Martin Imm of Prudential, which stated that by selling Hall's prior to filing the registration statement Tiger will avoid disclosing the large potential withdrawal liability it might face if Halls should fail, and also avoid documenting Hall's present operating problems (*supra*, at 35). Mr. Imm testified that he could not recall discussing this subject with anyone from Tiger nor recall the source of his information (Imm Dep. 40-42). His associate, Brandon Walsh, testified to his understanding that Tiger wanted to avoid having to discuss Hall's continuing problems in the registration statement, and that "the pension exposure was one of several issues, incentives, motivations" for selling by year end. He believed that this information came from Bodford and either Cronin or Harter. (Walsh Dep. 113-122.)

The Fund argues that this evidence confirms that Hall's was sold in order to avoid a disclosure of the connection between the Override Agreement and an assessment of withdrawal liability. I believe, however, that the evidence is too ambiguous for that. At most, it indicates that unwillingness to disclose potential withdrawal liability was but one of the reasons for timing the sale by year end, along with the concern, as testified to by Cronin and

Hoffman, regarding the adverse impact of having to discuss Hall's operating problems. Moreover, the Imm and Walsh evidence literally refers only to a disclosure of potential withdrawal liability that was in fact made. I am unable to read this evidence as establishing that Tiger was attempting to avoid a further disclosure—the relationship between the Override Agreement and withdrawal liability —that all of the other evidence indicates that Tiger was very unlikely to have considered providing in any event.

The Fund cites several other documents—unrelated to the disclosure question—which it also claims provides "smoking gun" evidence of Tiger's evasive intent. I believe the Fund has greatly overstated their significance. For example, the fact that Whit Lee, as recounted in the Goffman memorandum (smoking gun No. 3), (*supra*, at 20, 32-33) stated that he was not offering to put up his own money to buy Hall's because he would be assuming the risk of Hall's unfunded pension liability, certainly is not evidence that *Tiger* had an evasive purpose, as the Fund insists. And the fact that in LeGrand Price's handwritten notes of the December 12, 1984 meeting (smoking gun No. 2) (*supra*, at 19, 33), the letters "MEPA" appear on a sheet two pages after "Wants deal closed before S-1," is in my view meaningless.

Somewhat closer to the mark, perhaps, is the memorandum dated October 6, 1984 by John Lafferty, the Arthur Andersen engagement partner for the Hall's account, which described Cronin as having mentioned withdrawal liability several times and which concluded that Cronin and Tiger "have focused on this as a real obstacle to doing something with Hall's" (smoking gun No. 1) (*supra*, at 15, 32). While this likewise is cited by the Fund as clear proof of Tiger's evasive purpose, the fact is that withdrawal liability *is* an obstacle to various actions that an owner might otherwise take with respect to a business operation. For example, as Mr. Bannister of Alex. Brown observed, MEPPA may preclude an em-

ployer from effectuating certain downsizings that would result in partial withdrawal. He also noted that prospective purchasers may focus on a company's contingent withdrawal liability, and that factor will affect the valuation they place on the company or their desire to acquire it (Bannister Dep. 105). And, as just noted, Whit Lee used the fact that he would be assuming Hall's potential withdrawal liability as an argument for why he should not be expected to put up any money of his own.

I see nothing sinister about a business manager being aware that certain actions—such as downsizing portions of the operation—might trigger withdrawal liability, or that potential purchasers might have some reluctance about acquiring a company which is subject to such a contingent liability. With regard to the particular conversation referred to in Lafferty's memorandum, Lafferty himself testified that at the time he was interested in whether any of the actions Cronin had indicated Tiger was considering taking with respect to Hall's might require him, as Hall's outside auditor, to alter the treatment of Hall's withdrawal liability, which he had been footnoting as a contingent liability, to an absolute liability and placed on the balance sheet. In particular, he stated, he was concerned whether there might be "a significant contraction that could have recharacterized that liability pretty quickly." (Lafferty Hrg. 215-19.) Given these considerations, I am not able to attribute to the Lafferty memorandum the "smoking gun" significance that the Fund claims for it.

There are a number of other circumstances relating to the transfer of Hall's that the Fund cites as evidencing Tiger's purpose to evade or avoid withdrawal liability. For example, the Fund claims that a liquidation of Hall's would have brought Tiger far more than the $1,000 sale price received from Bodford, and must be assumed not to have been pursued only because it would have triggered withdrawal liability.

There are several points to consider with respect to this contention. One is that the $1,000 received from Bodford is clearly not the significant consideration for this transaction. Rather, the real consideration included the secured commitment to pay the $10.5 million owed by Hall's to Tiger and the opportunity to participate, through the retained 25% interest, in Hall's future profitability. As Professor Linneman pointed out, as long as Hall's was losing money, Tiger, as 100% owner, had no prospect either of collecting on its debt or receiving profits. If, however, for reasons already discussed at length, Hall's had more favorable prospects for returning to profitability under other ownership, then the potential return to Tiger from the sale obviously far exceeded Bodford's $1,000.

As to whether outright liquidation of Hall's would have been more advantageous to Tiger—apart from the fact that it would have triggered withdrawal liability—the evidence is not at all clear. Both Professor Linneman and Mr. Hempstead offered estimates of what Hall's might have recovered in liquidation. In Linneman's view, a liquidation might have netted $8 million less than Hall's liabilities, without even taking account of Hall's intercompany debt. Hempstead, on the other hand, estimated that liquidation could have produced $16.5 million, after covering all liabilities, including intercompany debt. (Both estimates were without reference to withdrawal liability.)[14]

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[14] Both witnesses were apparently working off an October 1984 financial statement that appeared in the Alex. Brown offering memorandum (Ex. 81). That statement showed liabilities (not including intercompany debt) of $57.4 million. It also showed "current assets", including cash, accounts receivable and "other", totalling $29.6 million. Of this amount, Linneman suggested that $14 might be recovered. Hempstead testified that he could not recall by how much he had reduced the $29.6 million number, to

Professor Linneman's numbers admittedly represented just a "quick think" approach to the matter, while Mr. Hepstead's testimony did not provide all of the components of his calculation (see footnote 14). Accordingly, although their estimates do provide some idea of the range of possibilities, they do not really establish what actually might have been received in a liquidation or how that number would compare to the going concern value that might be realized in a turnaround of Hall's. While it is quite possible that were it not for the fact that it would trigger withdrawal liability, the potential proceeds of a liquidation would have been considered more intensively than appears to have been the case, I also note that a further disadvantage of liquidation, as Professor Linneman testified and as Mr. Cronin had already learned in trying to liquidate the assets of Tiger Air, selling off a company's vehicles, equipment, terminals and other specialized properties can take a considerable period of time, and the actual proceeds may not come close to advance projections. In view of these considerations, and my conclusion that at that time there were realistic prospects for the Company's continued viability, I do not find that sale of Hall's as a going concern, rather than its liquidation, reflected an evasive purpose.

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take account of uncollectibles, etc, in reaching his ultimate recovery figure (Hempstead Hrg. 78-9).

The financial statement also showed land and buildings, and machinery and equipment with a total book value of $52.3 million. Linneman suggested that of this amount a recovery of $42 million might be a reasonable estimate. In reaching his bottom line figure he also deducted an estimated $10 million in liquidation fees and $2 million for operating costs during the period of liquidation. Hempstead, on the other hand, estimated that land and buildings would bring $36 million, based on a statement in the Alex. Brown offering memorandum that the real property had an estimated value of $6 million over book. With regard to equipment, Hempstead used $27 million, based on an appraisal done in early 1985 for one of Hall's lenders (Ex. 350).

The Fund also points to the approval of the transaction by Tiger's Board of Directors in a telephone meeting, and although the minutes reflect that there was discussion and questioning by the directors of Hoffman and Cronin, there appears to have been very little in the way of written materials explaining the transaction or discussing alternatives and other options, and no fairness opinion or other presentation by Alex. Brown. In the Fund's view, the Board's evident lack of concern with such matters is further indication that the overriding concern was simply to eliminate Tiger's exposure to Hall's potential withdrawal liability.

It should be noted in this regard that special telephone meetings do not appear to have been an unusual practice for this Board. While we do not know just what discussion and questions occurred during the meeting, I am inclined to agree with the Fund that the Board seems to have been provided with less supporting and explanatory material than I would want to have were I a director. Nonetheless, the implication of the Fund's argument is that Gerald Ford and the other four outside directors who participated in the meeting were told, either during the meeting or in advance, that they were not provided with materials that might otherwise be appropriate because the *real* reason for the transaction—not disclosed in Cronin's memorandum or in the minutes of the meeting—was to avoid the effects of Hall's potential withdrawal liability. This is one possible supposition as to what occurred, but there is really no evidence to support it. I would more readily conclude that this was a Board, like many, which simply was not particularly rigorous about requiring management to justify and document its recommendations.

Other circumstances cited by the Fund include the condition in the transfer agreement allowing Tiger to undo the transaction unless Heller made good on its commitment to provide Hall's with an additional $5 million

in financing by January 31, 1985, and the fact that Tiger never exercised its right under the sales agreement to appoint a director to Hall's board. The Fund argues that what it calls "the string" indicated a concern that Hall's not sink too soon, thereby creating a problem of preference in the granting of collateral, while the failure to appoint a director shows that Tiger did not really believe that its remaining 25% interest in Hall's had any value.

In my view, "the string" is sufficiently explained by the fact that if Heller did not come through with the additional financing, a basic underpinning of the transaction would be lost; Hall's would probably not be able to continue operating long enough to get an ESOP in place and Tiger would lose any chance of collecting on its $10.5 million note or realizing any return on its remaining 25% interest. Accordingly, as Hoffman testified, if the additional funds were not forthcoming from Heller, Tiger did not want to do the transaction (Hoffman Hrg. 43-44). With respect to Tiger's decision not to appoint a director to Hall's board—which according to Harter reflected a preference not to become involved in Hall's management —I am unable to attach to it the significance claimed by the Fund. On this score I am left with the feeling that if Tiger *had* appointed a director, the Fund would likewise have found in such action evidence of improper motives on Tiger's part.

Finally, the Fund cites the fact that in December 1985, Tiger gave away to HAC its remaining 25% interest in Hall's. That action, which is discussed *supra*, at 25-26, was taken after Bodford had threatened to redeem the 75% interest that HAC held in Hall's and thereby make Tiger Hall's sole shareholder. Tiger acceded to Bodford's demand, as its general counsel, Robert Harter, testified since the company was now in dire straits and Tiger did not want to be in the position of becoming its owner under those circumstances.

The fact that Tiger so acted "because of MEPPA," as Harter stated, does not, as the Fund suggests, demonstrate that Tiger had acted for the same reason a year earlier when it made the original transfer to HAC. It is fair to say that prospects had changed considerably during the interim. Bodford had achieved the ESOP, but it had proven not to have had the restorative effects that had been so widely anticipated. Under Bodford's leadership Hall's had lost very substantial revenues and market share, as well as management personnel, and was badly in need of additional financing. It had become, as Harter described it, "an unmitigated disaster" (Harter Hrg. 76), and the 25% stock interest that Tiger turned over to HAC clearly had little potential value at that point. In the absence of evidence that these developments were what should have been foreseen at the outset, I do not believe that Tiger's unwillingness to reassume ownership of Hall's at the end of 1985 demonstrates that it acted for improper motives when it sold the company a year earlier.

The last comment brings me back to where I started much of this discussion—the prospects for Hall's viability and return to profitability, viewed as of late 1984. If there were at that time no reasonable likelihood that Hall's could succeed, I would have difficulty in accepting the *bona fides* of Bodford as head of the purchasing group, or the evidence offered by Tiger as to its reasons for the transaction. However, despite the fact that Hall's failed rather soon after the sale, I do not find on this record that this was the result inevitably to be expected. On the contrary, as discussed earlier in this Opinion, the evidence demonstrates that there were reasonable grounds for believing that Hall's could survive and be made profitable, and that evidence has weighed significantly in this decision.

II. *The Accrual Theory Issue*

As an alternative basis for holding Tiger liable, the Fund advances its so-called accrual theory, which presents solely an issue of statutory construction.

According to the accrual theory, members of the controlled group of a contributing employer do not incur a withdrawal when the stock of that entity is transferred in a transaction referenced by Section 4218(1) of the Act, 29 U.S.C. § 1398(1), as long as contributions continue to be made by the transferred entity.[16] If the con-

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[15] As worded prior to 1986, Section 4218, 29 U.S.C. 1398, provided as follows:

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—
>
> (1) an employer ceases to exist by reason of—
>
> (A) a change in corporate structure described in section 4062(d), or
>
> (B) a change to an unincorporated form of business enterprise,
>
> if the change causes no interruption in employer contributions or obligations to contribute under the plan . . . .
>
> For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

Section 4062, 29 U.S.C. § 1362, as referenced in the above section, provided as follows prior to 1986:

> (a) This section applies to any employer who maintained a single-employer plan at the time it was terminated . . . .
>
> (d) For purposes of this section the following rules apply in the case of certain corporate reorganizations:
>
> (1) If an employer ceases to exist by reason of a reorganization which involves a mere change of identity, form, or place of organization . . . a successor corporation resulting from such reorganization shall be treated as the employer to whom this section applies.
>
> (2) If an employer ceases to exist by reason of a liquidation into a parent corporation, the parent corporation shall be treated as the employer to whom this section applies.

tributing entity subsequently withdraws, however, any member of that entity's former controlled group or groups is jointly and severally liable for withdrawal liability to the extent that the liability accrued during the years in which that member was part of the same controlled group.

Because operation of the accrual theory is based upon annual increments of what the Fund regards as pension "debt," the Fund explains that its theory applies only to those plans using the presumptive method of calculating withdrawal liability. The presumptive method determines withdrawal liability with reference to a plan's unfunded vested liabilities as of the end of the plan year prior to MEPPA's enactment, with annual changes in those liabilities being calculated thereafter.

This attempt to fasten liability on former controlled group members is contrary to the so-called "snapshot" approach to withdrawal liability, under which liability extends only to the contributing entity and those who are members of its controlled group as of the date of withdrawal. This is the approach that has been adopted by the courts, including the Third Circuit in *IUE AFL-CIO Pension Fund* v. *Barker & Williamson, Inc.*, 788 F.2d 118 (3rd Cir. 1986), as well as by the Pension Benefit Guaranty Corporation. Moreover, the Fund's accrual theory has been specifically rejected by the courts that

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(3) If an employer ceases to exist by reason of a merger, consolidation or division, the successor corporation or corporations shall be treated as the employer to whom this section applies.

The Single Employer Pension Plan Amendment Act of 1986, Pub. L. 99-272, amended ERISA to incorporate the provisions of Section 4062(d) into Section 4069(b), 29 U.S.C. § 1369(b), substantially unchanged, and the reference in Section 4218 was altered accordingly. Because the instant transaction occurred prior to January 1, 1986, the effective date of this amendment, the pre-1986 wording has been treated by the parties as applicable here.

have considered it, as lacking any support in the statute or its legislative history. *Teamsters Pension Trust Fund* v. *Central Michigan Trucking, Inc.*, 698 F.Supp. 698 (W.D. Mich. 1987), *aff'd*, 857 F.2d 1107 (6th Cir. 1988); *Teamsters Pension Trust Fund* v. *Headley's Express and Storage Company*, No. 92-5688 (E.D. Pa. June 3, 1993).

The Fund's convoluted arguments for its accrual theory—which to a significant degree are based on analogies to tax rules and other areas of law—have been discussed at length by the District Court and by the Sixth Circuit in their *Central Michigan Trucking* decisions, and I see nothing to be gained by repeating those analyses, with which I fully agree. I do address two points, however, which appear not to have been expressly raised in the prior cases.

In considering the statutory language which is pertinent to the Fund's accrual theory, the District Court in *Central Michigan Trucking*, discussed the last sentence of Section 4218, 29 U.S.C. § 1398 (see footnote 15), which provides that for withdrawal liability purposes "a successor or parent corporation or other entity resulting from [a change in corporate structure] shall be considered the original employer." The Court concluded that under this language "there can be only one original employer," and that original employer is the transferred contributing entity. Consequently, stated the Court, "only that employer and any control group to which it belongs at the time of withdrawal will be responsible for withdrawal liability." 698 F.Supp. at 702. The Sixth Circuit expressly agreed with this conclusion. 857 F.2d at 1109. It may be noted that the Pension Benefit Guaranty Corporation, in several Opinion Letters, has stated this same view of the statutory language. Opinion Letters 85-29 (December 5, 1985), 90-1 (March 20, 1990), 92-1 (March 30, 1992).

The Fund, however, now points to other statutory language which it believes demonstrates that there can be

"multiple successors." The provision thus relied on by the Fund is Section 4062(d)(3), 29 U.S.C. § 1362(d)(3) (see footnote 15), which states that in the case of a "division" of a controlled group, the "successor corporation or corporations" shall be treated as the employer subject to liability under Section 4062. The reference to "corporations" in the plural provides the Fund with confirmation that the statute contemplates "multiple successors"—an essential ingredient of its accrual theory. Fund Brief at 133; Reply Brief at 33-34.

One of the deficiencies of the Fund's argument in this regard is that Section 4062, 29 U.S.C. § 1362, by the express terms of subsection (a), is not applicable to multiemployer plans. To be sure, Section 4062(d), 29 U.S.C. § 1362(d) is referenced by Section 4218, 29 U.S.C. § 1398, but that is only for purposes of identifying the types of changes in corporate structure that the latter provision declares not to constitute withdrawals (mergers, consolidations, divisions, etc.).[16] The rules set forth in

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[16] There is some disagreement between the parties as to whether Section 4218 has any application to the present case. The Fund has assumed that the sale of Hall's stock by Tiger constituted a "division" of the controlled group within the meaning of Section 4062(d)(3), and accordingly, by virtue of Section 4218, there was no withdrawal by Tiger at the time of the transaction since Hall's continued to be a contributing employer. By the same token, the Fund argues that once Hall's ceased its contributions, what it regards as the "multiple successor" language of Section 4062(d)(3) permits the Fund to assess liability against Tiger under its accrual theory.

Tiger, on the other hand, points out that the transactions described in Section 4062(d), and thereby referenced in Section 4218, are tax-free reorganizations, etc., in which corporations are permitted by the Internal Revenue Code to engage in certain changes in form without incurring income tax, and are characterized by complete or substantial continuity of ownership before and after the transaction. Accordingly, Tiger believes that Section 4218 does not apply to the sale of a subsidiary's stock to an unrelated entity, as occurred in its sale of Hall's. In its view, Section

Section 4062(d), 29 U.S.C. § 1362(d) for single-employer plan liability were certainly not imported into Section 4218, 29 U.S.C. § 1398. Thus, the "original employer" provision of the latter Section is the governing language, and that has been authoritatively construed contrary to the Fund's position.

The Fund also contends that it need not establish that its accrual theory represents the correct interpretation of the statute; only that it be a reasonable one. The Fund cites in this regard Section 405 of MEPPA, which provides:

> SEC 405. ACTION TAKEN BEFORE REGULATIONS ARE PRESCRIBED.
>
> (a) Except as otherwise provided in the amendments made by this Act and in subsection (b), if the way in which any such amendment will apply to a particular circumstance is to be set forth in regulations any reasonable action during the period before such regulations take effect shall be treated as complying with such regulations for such period.
>
> (b) Subsection (a) shall not apply to any action which violates any instruction issued, or temporary

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4218 was not necessary to shield it from withdrawal liability at the time it sold Hall's stock since no withdrawal occurred at that point.

While the matter is not of importance in the ultimate resolution of the accrual theory issue, I would note that pertinent legislative history of MEPPA, quoted and relied upon by the Sixth Circuit in its *Central Michigan Trucking* decision (857 F.2d at 1109-10), has been generally understood as authority for the proposition that the sale of a subsidiary's stock to an unrelated party is a change in structure encompassed by Section 4218. See PBGC Opinion Letters 82-4 (February 10, 1982) and 85-29 (December 5, 1985), referencing H.R.Rep. No. 96-869, Part II, 96th Cong., 2d Sess. 16; and Joint Explanation of S. 1076, 126 Cong. Rec. 20189, 20193 (July 29, 1980). See also *Dorn's Transportation*, *supra*, 787 F.2d at 900-01.

> rule prescribed, by the agency having jurisdiction but only if such instruction or rule was published, or furnished to the party taking the action, before such action was taken.

The gist of this portion of the Fund's argument is that its assessment of withdrawal liability based on the accrual theory was a "reasonable action" taken in the absence of regulations to the contrary, and must therefore be upheld.

I seriously doubt that the Fund's attempt to collect liability on the basis of a theory so lacking in statutory support can be considered "reasonable action." Moreover, I believe the Fund has greatly misconceived the purpose of Section 405. It was intended to take account of the fact that a number of MEPPA's provisions were dependent upon the issuance of implementing regulations—a process that Congress recognized would take time, during which parties might have to take action on some reasonable basis.

There is no provision of MEPPA relied on by the Fund in connection with its accrual theory which falls within this category. The only statutory provision the Fund has cited in response to my question in this regard is Section 4001(b), which requires PBGC to adopt controlled group regulations, consistent with Treasury regulations under Section 414(c) of the Internal Revenue Code. Section 4001(b) was not part of the MEPPA amendments. Rather, it was part of the original ERISA legislation, and the required regulations were adopted by the PBGC in 1976.

As best as I can determine, it is the Fund's position that because those regulations do not expressly foreclose the inclusion of former controlled group affiliates of a withdrawing employer as targets of liability assessments, it is free to invoke the accrual theory with the blessing of Section 405. It is my view that Section 405 provides no support whatsoever for that position.

For the foregoing reasons, and for the further reasons set forth in the District Court and Court of Appeals decisions in the *Central Michigan Trucking* case, I conclude that the accrual theory is invalid and provides no basis for the Fund's assertion of withdrawal liability against Tiger.

AWARD

For the reasons set forth herein, the Fund's assessment of withdrawal liability against Tiger International, Inc., The Flying Tiger Line, Inc., and Warren Transport Company, Inc. is set aside.

The arbitrator's fees and the administrative fees of the American Arbitration Association shall be borne equally by the parties, and paid as directed by the Association. The parties shall bear their own costs and attorney's fees in connection with this arbitration.

/s/ Robert E. Nagle
ROBERT E. NAGLE
Arbitrator

December 22, 1993

No. 96-1149

Supreme Court, U.S.
FILED
FEB 19 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY AND CHARLES J. SCHAFFER, JR., its administrator and fiduciary,

Petitioners,

v.

FEDERAL EXPRESS CORPORATION; THE FLYING TIGER LINES, INC.; WARREN TRANSPORT, INC.; TIGER INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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29 pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Whether the Arbitrator, the District Court for the District of Delaware and the unanimous panel of the Court of Appeals for the Third Circuit, correctly applied well-established principles of law to this voluminous record in determining that the buyer, Hall's Acquisition Corporation and the seller, Tiger International, Inc., did not have evasion or avoidance of withdrawal liability as a principal purpose in the sale of Hall's Motor Transit Company, Inc. for purposes of 29 U.S.C. § 1392(c).

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent before this Court is Federal Express Corporation. In 1989, Federal Express Corporation merged with Tiger International, Inc., whose former subsidiaries included The Flying Tiger Line, Inc. and Warren Transport Company, Inc. The surviving entity's name is Federal Express Corporation.

Pursuant to Rule 29.6 of the Rules of the Court, Respondent, Federal Express Corporation, states that it has no non-wholly owned subsidiaries and no parent company.

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	ii
TABLE OF AUTHORITIES	v
COUNTER-STATEMENT OF THE CASE	1
I. PROCEDURAL BACKGROUND	2
A. The Arbitrator's Decision	3
B. The District Court's Confirmation Of The Arbitrator's Award	4
C. The Court Of Appeals' Affirmance Of The District Court	4
II. FACTUAL BACKGROUND	4
REASONS FOR DENYING THE WRIT	11
I. REVIEW OF THE COURT OF APPEALS' JUDGMENT ORDER WOULD NOT REQUIRE THE COURT TO RESOLVE ANY ALLEGED CONFLICT BETWEEN THE CIRCUIT COURTS	11
A. The Arbitrator's Alternative Holdings *Rejected* The Fund's Position Under Both Legal Standards	11
B. The Fund's Empty Speculation Concerning The Supposed Basis For The Court of Appeals' Judgment Order Provides No Basis For Review By This Court	13
II. THE COURT OF APPEALS' JUDGMENT ORDER INVOLVED ONLY THE ROUTINE APPLICATION OF ESTABLISHED PRINCIPLES TO A VOLUMINOUS FACTUAL RECORD THAT HAS ALREADY BEEN CAREFULLY REVIEWED BY THREE TRIBUNALS	13

TABLE OF CONTENTS—*(Continued)*

Page

A. The Arbitrator Affirmed by the District Court and the Court of Appeals Correctly Decided This Case Under The Standards Articulated In Both *Santa Fe* And *Dorn's* 15

B. The Fund's "Partnership Approach" Or "Accrual Theory" To Withdrawal Liability Is Mere Hyperbole And Is Simply An Attempt By the Fund To Distort Law 19

CONCLUSION 22

TABLE OF AUTHORITIES

CASES Page(s)

Central States, Southeast and Southwest Areas Pension Fund v. Crown Cork & Seal Co., Inc., 982 F.2d 857 (3d Cir. 1992), *cert. denied*, 508 U.S. 972 (1993) 5

Chicago Truck Drivers, Helpers and Warehouse Workers Pension Fund v. Louis Zahn Drug Co., 890 F.2d 1405 (7th Cir. 1989) 17

Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust For Southern California, 508 U.S. 602 (1993) 14

Dorn's Transportation v. Teamsters Pension Trust Fund, 787 F.2d 897 (3d Cir. 1986) ..... *passim*

Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia, 830 F.2d 1241 (3d Cir. 1987) 2

IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118 (3d Cir. 1986) 20

Pension Benefit Guaranty Corp. v. White Consolidated Industries, 998 F.2d 1192 (3d Cir. 1993), *cert. denied*, 510 U.S. 1042 (1994) 17

Santa Fe Pacific Corp. v. Central States, S.E. & S.W. Areas Pension Fund, 22 F.3d 725 (7th Cir.), *cert. denied*, 115 S. Ct. 483 (1994) ..... *passim*

Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking Line, 698 F.Supp. 698 (W.D. Mich. 1987), *aff'd*, 857 F.2d 1107 (6th Cir. 1988) 20

Teamsters Pension Trust Fund v. Headley's Express and Storage Company, 1993 WL 189933 (E.D. Pa. June 3, 1993) 20

Trustees of Amalgamated Insurance Fund v. McFarlin's Inc., 789 F.2d 98 (2d Cir. 1986) 21

TABLE OF AUTHORITIES—*(Continued)*

STATUTES AND RULES Page(s)

11 U.S.C. § 507 21

29 U.S.C. §§ 1001 *et seq.* 2

29 U.S.C. § 1381 3

29 U.S.C. §§ 1381-1461 ..... 2, 19

29 U.S.C. § 1392(c) ..... *passim*

Supreme Court Rule 29.6 ii

No. 96-1149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY AND CHARLES J. SCHAFFER, JR., its administrator and fiduciary,

Petitioners,

v.

FEDERAL EXPRESS CORPORATION; THE FLYING TIGER LINES, INC.; WARREN TRANSPORT, INC.; TIGER INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Respondents, Federal Express Corporation, The Flying Tiger Line, Inc., Warren Transport Company, Inc. and Tiger International, Inc. (collectively hereinafter referred to as "Fed-

eral Express")[1] respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Judgment Order of the Court of Appeals for the Third Circuit ("Judgment Order").

In its Judgment Order, the Court of Appeals for the Third Circuit affirmed the District Court for the District of Delaware's Memorandum Opinion and Order which confirmed and enforced a statutory Arbitration Award, which was accompanied by an 83-page decision by the Arbitrator. This Arbitration Award held that Federal Express was not liable to Petitioners, Teamsters Pension Trust Fund of Philadelphia and Vicinity, *et al.* (the "Fund") for withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 ("MPPAA" or "the Act") arising out of Federal Express' acquisition of Tiger International, Inc. (2a, 72a).[2]

I. PROCEDURAL BACKGROUND

In March, 1986, Hall's Motor Transit Company, Inc. ("Hall's"), a former wholly-owned subsidiary of Tiger International Inc. ("Tiger"), filed for bankruptcy in the Middle District of Pennsylvania, and within a period thereafter, ceased contributing to certain multiemployer pension funds. Judicial proceedings followed under MPPAA in which both parties sought declaratory and injunctive relief.[3] Tiger initiated arbitration pursuant to Section 4221 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001, *et seq.* to review the withdrawal liability assessment the Fund

[1]In 1989, after the events giving rise to this case, Tiger International, Inc. and its subsidiaries, The Flying Tiger Line, Inc. and Warren Transport Company, Inc., merged with Federal Express and the entity's name was changed to Federal Express Corporation.

[2]References to the Appendix accompanying the Fund's Petition for a Writ of Certiorari are abbreviated herein as "___a.". References to the Petition for Writ of Certiorari are abbreviated herein as "Pet. ___". References to the Joint Appendix in the Court of Appeals below are abbreviated herein as "JA ___".

[3]The Court of Appeals for the Third Circuit held that the issues in this case were subject to statutory arbitration. *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia*, 830 F.2d 1241 (3d Cir. 1987).

claimed against Tiger and two of its subsidiaries, The Flying Tiger Line, Inc. ("Flying Tiger") and Warren Transport Company, Inc. ("Warren").

By stipulation, the parties selected a highly experienced and expert Arbitrator, the former Executive Director (from 1979 to 1982) of the United States Pension Benefit Guaranty Corporation ("PBGC"), Robert E. Nagle, Esquire.[4] The core issue before the Arbitrator was the Fund's contention that Tiger's sale of Hall's had as "a principal purpose" the evasion or avoidance of withdrawal liability, a withdrawing employer's proportional share of a multiemployer pension plan's unfunded vested benefits. *See* 29 U.S.C. §1381.

A. The Arbitrator's Decision.

After extensive discovery proceedings, 5 days of hearings, consideration of 19 depositions consisting of over 3,000 pages, hearing transcripts, over 365 exhibits, and extensive briefs filed by the parties, the Arbitrator, on December 22, 1993, issued an 83-page Opinion and Award (the "Award"). Arbitrator Nagle considered and rejected the Fund's arguments that Federal Express was liable for withdrawal liability under the standards the Fund argues are articulated in both *Dorn's Transportation v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986) and *Santa Fe Pacific Corp. v. Central States, S.E. & S.W. Areas Pension Fund*, 22 F.3d 725 (7th Cir.), *cert. denied*, 115 S. Ct. 483 (1994). (107a-108a, 113a-135a).

Arbitrator Nagle held that Tiger's sale of Hall's was not a transaction which had as a principal purpose to "evade or avoid" withdrawal liability, and therefore, that Tiger was not

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[4]Despite the parties' mutual selection of Arbitrator Nagle and his qualifications, the Fund continues to attack the credibility of Arbitrator Nagle, simply because the Fund disliked his decision. (Pet. at 17). An example of the Fund's unwarranted attack on the Arbitrator's credibility and character is found in its Reply Brief in the Court of Appeals below, wherein the Fund stated that Arbitrator Nagle exhibited "odd behavior" and that "One line of Byzantine thought attributes the award to a desire of the Arbitrator to continue his governmental mission at PBGC by forcing an appeal to limit the scope of *Dorn's*." Fund's Reply Brief at 5.

responsible for Hall's withdrawal liability. (142a). Specifically, Arbitrator Nagle held ". . . I conclude that Bodford as purchaser did not have as a purpose to evade or avoid withdrawal liability nor to enable the seller to do so. . . .", and also held that the seller, Tiger's reasons for selling Hall's were "plausible and valid." (113a, 121a). Additionally, Arbitrator Nagle held that Tiger was not responsible for Hall's withdrawal liability under the Fund's then so-called "Accrual Theory": "I conclude that the accrual theory is invalid and provides no basis for the Fund's assertion of withdrawal liability against Tiger." (142a.)

B. The District Court's Confirmation Of The Arbitrator's Award.

The parties subsequently filed motions and actions in the United States District Court for the District of Delaware, which were consolidated. After extensive briefing by the parties, and upon consideration of the entire record before Arbitrator Nagle, the District Court granted Tiger's Motion to Confirm and Enforce the Award and denied the Fund's Motion to Vacate the Award. (22a). The District Court held that the Arbitrator made no error in his numerous and explicit factual and legal findings and determined that Federal Express was not liable for any withdrawal liability under the *Dorn's* and *Santa Fe* standards. (13a-17a). Additionally, the District Court also rejected the Fund's convoluted "Accrual Theory" of withdrawal liability and held that "the accrual theory is invalid under ERISA/MPPAA". (18a-21a).

C. The Court Of Appeals' Affirmance Of The District Court.

After briefing and oral argument before a three-judge panel (Nygaard, Lewis, and McKee, JJ.) held on August 7, 1996, the Court of Appeals affirmed without opinion the District Court's affirmance of the Arbitrator's Award in a Judgment Order entered on August 20, 1996. (2a). The Fund's Petition for Rehearing by the Panel and Suggestion for Rehearing *In Banc* was denied on October 21, 1996. (26a).

II. FACTUAL BACKGROUND

The Fund distorts and misstates the facts. Contrary to the Fund's contentions that Tiger was motivated to sell Hall's in order to avoid withdrawal liability, that the transaction was a "sham", and that the sale was a "gift" to the buyer Bodford (Pet. at 7-10), the Arbitrator, the District Court, and the Court of Appeals found exactly the opposite.

The Arbitrator's findings of fact are entitled to deference and are "rebuttable only by a clear preponderance of the evidence" — in other words, a finding of clear error. *See* 29 U.S.C. §1401(c); *Central States, Southeast and Southwest Areas Pension Fund v. Crown Cork & Seal Co., Inc.*, 982 F.2d 857 (3d Cir. 1992), *cert. denied*, 508 U.S. 972 (1993). (10a). Petitioner simply seeks to reargue in this Court its thrice-rejected factual contentions in this case and have this Court repeat the same fact-intensive record review three different tribunals have already conducted.

Petitioner's one-sided, inaccurate account of the facts is placed in its proper context by a consideration of the facts that the Arbitrator, the District Court and the Court of Appeals found compelling. During late 1979 through 1981, Tiger acquired three trucking companies. One of these was Hall's. By the end of 1981, Hall's had begun to experience net operating losses, which continued each year until its eventual sale by Tiger. (JA 1000-1010, 1132).

Hall's financial situation was only part of the financial nightmare facing Tiger and its major subsidiaries. By the end of 1982, Tiger and several of its subsidiaries were experiencing cash shortages. (JA 1156, 1163, 1165, 1226). On February 14, 1983, Flying Tiger, North American and several other Tiger subsidiaries declared a moratorium on payments of principal and interest in its debt, and invited lenders to renegotiate new terms and payment schedules. (JA 1286-1341, 7001-7004). Hall's debt restructuring was among the first to be accomplished. In December, 1983, Flying Tiger, Tiger's principal subsidiary, restructured all its debt in an Override Agreement.

The Override Agreement contained onerous financial conditions. Even after restructuring its debt in April, 1983, Hall's continued to experience operating losses. (JA 4026-4076). Beginning in March, 1984, Wayne Hoffman, Tiger's Board Chairman and Chief Executive Officer, asked James Cronin, then a Vice President of Tiger, President of TigerAir, and Assistant to Tiger's Chairman, to evaluate the Hall's situation. Cronin was named President of Hall's in May, 1984. (JA 5173-5174, 7521).

Hoffman was optimistic that the Hall's financial situation could be turned around if it had the right leadership and could cut costs. (JA 5045, 5172-5173). Although Cronin made initial progress, he predicted a cash shortfall during the first quarter of 1985 of approximately $5 million. (JA 5068). Hall's then CFO, Alvin Bodford ("Bodford"), complained from the start that *he*—not Cronin—should have been named President of Hall's. Bodford offered approximately $15 million for one hundred percent (100%) ownership of Hall's, which would have covered the approximately $10 million of intercompany debt and would have provided $4 to $5 million in cash to Tiger. (JA 4152-4154). The only condition was that an employee stock ownership plan ("ESOP") be in place at the time of sale. Cronin testified that Bodford's offer was inadequate because, with an ESOP in place, Hall's was worth more. Cronin recognized that if Tiger could successfully establish an ESOP, Hall's would be instantly profitable. (JA 5093).

Hall's atypical labor costs were a significant cause of its unprofitability. Cronin explored the possibility of securing wage concessions in return for an ESOP with an ESOP consultant and the Teamsters officials. Cronin concluded that as long as Tiger owned Hall's it would be difficult to obtain such concessions. (JA 5133, 5137, 5342, 5347).

Although Bodford had never been told an "ESOP was not possible while Tiger owned Hall's," Bodford acknowledged that it would "be more difficult to get the Teamsters' blessing for an ESOP while Tiger owned Hall's." (JA 4481). Cronin met with John Lafferty, the Arthur Andersen engagement partner on the Hall's account on October 5, 1984. Lafferty's memorandum memorializing Cronin's efforts with respect to the ESOP

pointed out that the Company had to make some important strategic decisions, also noting other options Tiger Management was considering, including outright sale, a joint-venture, a restructuring, and a capital infusion by Tiger. (JA 6151).

By letter agreement dated November 1, 1984, Tiger engaged Alex. Brown & Sons, Inc. ("Alex. Brown"), an investment banking firm with trucking industry experience, to devise a plan to maximize Hall's value. Alex. Brown's engagement was not limited to selling Hall's, but also reflected Tiger's willingness to consider other arrangements, including merger, acquisition or investment. (JA 4130, 5072-5073, 6150).

On December 5, 1984, North American and its parent, Tiger Leasing Group Inc. filed a voluntary Chapter 11 Bankruptcy Petition. As a result of this bankruptcy filing, funds could no longer be up streamed from North American. Funds could also not be up streamed from Flying Tiger. Tiger now could not provide the necessary financial breathing room to Hall's to implement an ESOP—at that point considered essential to Hall's turnaround. (JA 5122, 5178). North American's bankruptcy and the attendant publicity also heightened the negatives of Hall's association with Tiger.

As part of the settlement with the North American lenders holding Tiger's collateral, Tiger agreed to a public offering, in early 1985. As the Arbitrator correctly found, these developments made it important for Tiger to sell Hall's:

> The consequences of the North American Bankruptcy left Tiger particularly desirous of finding a purchaser for Hall's by the end of 1984. The major considerations appear to have been (1) the constraints that now existed upon the further use of Flying Tiger as a source of cash, and (2) the forthcoming public stock offering and the S-1 registration statement that would be filed in connection with that offering. (86a).

On November 13, 1984, Alex. Brown mailed a selling memorandum to potential purchasers. At a December 12, 1984, meeting with Cronin and other Tiger representatives, Whit Lee ("Lee"), an interested prospective purchaser, proposed a pur-

chase of all of Hall's stock for a $10 to $15 million note, which included the $10 million pre-existing debt owed by Hall's to Tiger. At the meeting, Lee and an associate, LeGrand Price ("Price"), learned that Tiger was anxious to close before the end of the year. Price's notes of the meeting contain references such as *"want deal cut before S-1"* and *"want to close not letter of intent"*. (JA 2490-2495). Learning this, Lee changed his proposal, offered to pay $1,000 in cash for one hundred percent (100%) of Hall's stock, offered to leave in place Hall's debt to Tiger up to $10.5 million, and offered to secure that debt, the deal to be subject to existing lenders' consent or to refinancing of the debt of any consenting lender. (JA 2496-2498).

Although Tiger had believed it desirable to resolve the Hall's situation by year-end, with North American's bankruptcy filing on December 5, 1984, the elimination of North American and Flying Tiger as cash sources, and the growing burden of keeping Hall's financially afloat, solving Hall's problems immediately became imperative. The ESOP and a $5 million cash infusion by a third party now also assumed urgent importance. On December 19, 1984, Lee and Cronin met with Hall's lenders. Bodford was also present. The lenders, whose consent was necessary to consummate the transaction, made it clear they would approve no transaction in which any significant amount of money went to Tiger rather than going to Hall's or being paid back to the lenders. (JA 5086).

During the December 19, 1984 meeting, Bodford abruptly announced he would meet Lee's offer. (JA 4421-4426). The lenders then met separately with Bodford, and preferred Bodford to Lee. As the Arbitrator found, Bodford and his existing management group were the known commodity. Lender Walter E. Heller Co.'s ("Heller") representatives were alarmed by Lee's threat to use bankruptcy filings to force renegotiation of union contracts. The Arbitrator summarized the deal that evolved:

> The proposed transaction that finally emerged from these meetings provided for Bodford and other senior members of Hall's management to form a corporation, Hall's Acquisition Corporation ("HAC"), that

would purchase 75% of Hall's stock from Tiger. HAC would pay Tiger $1,000.00 in cash and Tiger would receive a secured note for $10.5 million of the existing intercompany debt, such security to be subordinated to that of the lenders. Tiger would retain a 25% interest in Hall's and would have the right to name one director to the Hall's board. Tiger would pay the costs of closing the transaction (including Alex. Brown's fees) amounting to some $1 million, and would continue for up to one year its existing guarantees of certain of Hall's self-insured workers' compensation obligations. Tiger retained the right to cancel the sale if $5 million in new financing promised by Heller were not forthcoming by January 31, 1985. The purchaser would agree to cause Hall's to continue contributing to the various pension plans, and at substantially the same levels, as Hall's had contributed in the past.

With respect to the lenders, Heller would agree to lend up to an additional $5 million in return for a first lien on all unencumbered real estate and rolling stock, and would receive warrants which could be exercised to obtain a 12-1/2% interest in Hall's. (90a).

Lender Heller imposed important conditions and insisted on establishment of the ESOP. In recommending that Tiger sell Hall's to Bodford, *Cronin gave no consideration whatsoever to Hall's potential withdrawal liability.* (JA 5194-5195). In addition, Alex. Brown's recommendation to Hoffman and the Tiger Board to sell Hall's to Bodford summarized the considerations. They did not so much as mention withdrawal liability or MPPAA. (JA 3000-3003).

In a telephone meeting on December 31, 1984, the Tiger Board of Directors approved the sale. Six Directors were present, including former President of the United States, Gerald Ford. The Board's resolution recorded its reasons for approving the sale. There was neither consideration of, nor any mention of, withdrawal liability. (JA 2614).

Tiger's sale of Hall's to Bodford closed on January 7, 1985. Three weeks later Heller funded its $5 million commitment. Seventy-five percent of Hall's stock went to HAC, Bodford's acquisition company. Hoffman regarded as fair the sale of 75% of Hall's shares for (i) $1,000; (ii) the $5 million capital infusion by Heller; (iii) the granting of a $10.5 million secured note; and (iv) the retention of twenty-five percent (25%) of Hall's shares. (JA 5212).

Immediately after the closing, Hall's began negotiations with the Teamsters to establish an ESOP. (JA 5212). The ESOP was announced May 6, 1985. Total savings to the Company generated by the ESOP, estimated at approximately $77 to $80 million, contributed to a fourth-quarter operating *profit*. The difficulties that arose thereafter were unanticipated.

Hall's began to lose key management personnel. As Heller later complained to Bodford, *"[had] Heller known that substantially all of the management team that was to have participated in the management buyout of Hall's would leave the Company in 1985, it is highly unlikely that Heller would have financed the buyout transaction."* (JA 7473, 7523-7529). Given Heller's $5 million, creation of the ESOP and the final disassociation from Tiger, there was no reason to suppose this development could have been foreseen when Hall's was sold to Bodford in December, 1984. In mid-November, 1985, Bodford asked Tiger to give up both its 25% interest in Hall's, and its lien on Hall's assets which secured the $10.5 million obligation from Hall's to Tiger. Given his efforts, and risks, he felt that *he* alone should be the owner. (JA 3425-3426). He also believed he would be unable to secure essential additional financing as long as Tiger held a security interest in Hall's assets. Tiger subsequently entered into an agreement to relinquish its twenty-five (25%) share. (JA 3442-3453). Hall's was unable to obtain additional funding. The company filed a Chapter 11 Bankruptcy Petition on March 10, 1986. By the end of 1987, Hall's had ceased making contributions to various Teamster multiemployer pension plans.

REASONS FOR DENYING THE WRIT

I. REVIEW OF THE COURT OF APPEALS' JUDGMENT ORDER WOULD NOT REQUIRE THE COURT TO RESOLVE ANY ALLEGED CONFLICT BETWEEN THE CIRCUIT COURTS.

The Fund incorrectly suggests that this case presents the Court with the ability to resolve an alleged "conflict" between the circuit courts, arguing that the Court of Appeals for the Third Circuit's decision in *Dorn's Transportation v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986), "conflicts" with a decision of the Court of Appeals for the Seventh Circuit, in *Santa Fe Pacific Corp. v. Central States, S.E. & S.W. Areas Pension Fund*, 22 F.3d 725 (7th Cir.), *cert. denied*, 115 S. Ct. 483 (1994). (Pet. at 17, 19). It is noteworthy, however, that in the Court of Appeals the Fund posited *Dorn's* evade or avoid interpretation as dictum and not as a conflict with the Seventh Circuit's decision in *Santa Fe* or any other circuit court.[5]

The Fund's position with respect to the alleged "conflict" rests only on the decisions of two circuit courts — the Third and Seventh Circuits — and their interpretation of the "evade or avoid" provision contained in 29 U.S.C. § 1392(c). (Pet. at 15-23). Therefore, the issue — if there is an issue — is not a frequently occurring one. Any alleged "conflict" is also too premature to require the Court's attention.

A. The Arbitrator's Alternative Holdings *Rejected* The Fund's Position Under Both Legal Standards.

Putting to one side the question of whether there is any conflict at all and the relative lack of importance of the statutory construction issue involved, the short answer to the Fund

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[5]Thus, Federal Express asserts that a strong argument can be advanced that the Fund has waived any contention that this case presents a two-circuit conflict, and the issue involved in the alleged "conflict" is arguably not properly before this Court.

is that this case does not even present the issue. Arbitrator Nagle anticipated that the Fund would seek subsequent judicial review, and applied not only the *Dorn's* standard, but also the *Santa Fe* standard. The Arbitrator alternatively evaluated the evidence under the legal standard the Fund asserts was adopted by the Seventh Circuit in *Santa Fe* in which the seller's purposes for the sale alone are examined to determine whether a principal purpose of a transaction was to evade or avoid withdrawal liability. (113a).

After concluding that the buyer had *no purpose* to evade or avoid withdrawal liability (113a), let alone *a* principal purpose, the Arbitrator expressly considered separately "the evidence bearing on Tiger's purpose in selling Hall's":

> Notwithstanding the foregoing conclusion, I recognize that the Fund has based its case mainly on the proposition that despite the language of the *Dorn's* decision, it is the seller's purpose alone that is controlling in the present circumstances. *Accordingly, in view of the prospect of further review of this matter based on that position, I believe it appropriate to consider the evidence bearing on Tiger's purpose in selling Hall's.* (113a) (emphasis added).

Applying this standard the Arbitrator concluded that the seller had no purpose to evade or avoid withdrawal liability, and thus found in favor of Federal Express. (116a-135a). Moreover, the District Court agreed with the Arbitrator, distinguished the facts of this case from those of *Santa Fe*, and found in favor of Federal Express under *Dorn's* and the *Santa Fe* analysis as well. (16a-18a).

Since the Arbitrator and the District Court expressly considered and analyzed *both* of the allegedly "distinct" standards, and on *both* standards found for Federal Express and against the Fund, no "conflict" between those two circuits (if there were one) is even remotely presented by this case. Thus, this case is not an appropriate one in which to resolve the alleged "conflict ".

B. The Fund's Empty Speculation Concerning The Supposed Basis For The Court Of Appeals' Judgment Order Provides No Basis For Review By This Court.

The Fund attempts to wring from the one-line Judgment Order of affirmance some insight into the Court of Appeals' reasoning in this case and, in particular, the Court of Appeals' interpretation of the "evade or avoid" provision of 29 U.S.C. § 1392(c). This, of course, is unhelpful hyperbole and exaggeration. The Third Circuit affirmed the District Court in a Judgment Order which did not detail the Court's reasoning. It simply provided that it affirmed the District Court's decision for *"essentially the same reasons set forth in the District Court's Opinion"*. (2a-3a). In its essence, the District Court's Opinion confirmed the Arbitration Award on *both* grounds. (13a-18a). There is no basis for speculating that the Court of Appeals analyzed this case *only* under its previous decision in *Dorn's*.

Any "conflict" between *Santa Fe* and *Dorn's* is entirely academic in this case. The Arbitrator and the District Court rejected the Fund's factual contentions under the reasoning contained in *both*. (16a, 113a). The Court of Appeals affirmed in a Judgment Order. (3a-4a).

The Petition should be denied.

II. THE COURT OF APPEALS' JUDGMENT ORDER INVOLVED ONLY THE ROUTINE APPLICATION OF ESTABLISHED PRINCIPLES TO A VOLUMINOUS FACTUAL RECORD THAT HAS ALREADY BEEN CAREFULLY REVIEWED BY THREE TRIBUNALS.

The Fund suggests that the issue involved is "important to prevent dumping of unfunded pension liability . . . on other employers and the federal government." (Pet. at 23). This case presents the Court with no such important public policy issue. Further review in this case would only entail the application of established legal principles to an extensive factual record.

The Fund enjoyed a full and fair opportunity to present its case and its theories to three tribunals below. The parties conducted extensive discovery by way of deposition and document production prior to the Arbitration. The Arbitration took place in three cities over a period of five days. The parties *mutually* selected a highly-regarded and experienced Arbitrator, who made explicit factual findings and credibility determinations, including those of both parties' expert witnesses. The Arbitrator's Decision consisted of 83 pages of facts and analyses. The facts and inferences contained in this case have been thoroughly reviewed and analyzed by the Arbitrator, the District Court and the Court of Appeals. The appellate record in this fact-intensive case alone consisted of eight volumes of materials totaling 4,916 pages of exhibits, testimony and other materials. It is respectfully submitted that reassessment by this Court is neither appropriate nor necessary.[6]

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[6]The Fund argues that the Arbitrator's factual findings on the issue of evasion or avoidance of withdrawal liability should not be afforded any deference and mischaracterizes the Arbitrator's findings as "inferences". The Fund also cites an inapplicable tax case in support of its argument. (Pet. at 23.) The Fund's argument is baseless, a clear misstatement of the law, and conflicts with the case the Fund relies so heavily on, *Santa Fe Pacific Corp. v. Central States, S.E. & S.W. Areas Pension Fund*, 22 F.3d 725 (7th Cir.), *cert. denied*, 115 S. Ct. 483 (1994). The District Court properly found that the Arbitrator made explicit factual findings of the motives of the parties. (16a). Some of the Arbitrator's findings are inferences. These too are reviewed under a clearly erroneous standard of review. *Santa Fe*, 22 F.3d at 726-728. (Arbitrator's factual findings and any factual inferences on issue of whether company's purpose was to evade or avoid withdrawal liability to be reviewed only for clear error.)

In addition, the Arbitrator correctly applied the presumption of correctness which is afforded the Fund's determinations, as provided in 29 U.S.C. §1401(a)(3)(A) and as articulated in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust For Southern California*, 508 U.S. 602 (1993). The District Court in this case properly held that the Arbitrator correctly applied this presumption and rejected the Fund's reargument of its version of the facts: "This court finds that the arbitrator did correctly articulate the presumption and burden of proof, and there is no indication that he did not fully understand and apply them in this case." (12a-13a).

A. The Arbitrator Affirmed By the District Court and the Court of Appeals Correctly Decided This Case Under The Standards Articulated In Both *Santa Fe* And *Dorn's*.

The Fund seriously mischaracterizes the Third Circuit's holding in *Dorn's* to require proof that a party had "wilful criminal intent" to be found liable under 29 U.S.C. § 1392(c). (Pet. at i, 17). The Court held no such thing in *Dorn's*. It held that both parties to a transaction must act collusively in some manner, or the transaction has to be a "sham", in order to satisfy the Act's "evade or avoid" as "a principal purpose" of any transaction standard. *Dorn's*, 787 F.2d at 902. There is no requirement of any finding of "wilful criminal intent" in the statute. Contrary to the Fund's assertions, *Dorn's* clearly does not suggest otherwise.

The Arbitrator in this case correctly applied the *Dorn's* standard and held — not that evasion or avoidance of withdrawal liability was not "a principal purpose" — but that the buyer in this case did not have *"any purpose"* of evading or avoiding withdrawal liability:

> It thus appears that the Court viewed Section 4212(c) [of MPPAA] as applying, at least in transfer of business transactions, only to efforts to escape withdrawal liability through collusion or sham arrangement. [Footnote omitted].
>
> The point is important here because whatever purpose Tiger might have had in selling Hall's — and those purposes are considered at length below — *the Bodford-led HAC clearly did not have any purpose* of evading or avoiding withdrawal liability in purchasing the company, *nor does the Fund seriously so contend.* (107a-108a) (emphasis added).

There was no basis for finding "sham", "collusion" or "self-dealing". The Arbitrator specifically found *no* "sham transaction", *no* "collusion" and *no* "self-dealing". *A fortiori* there was no basis on which the Arbitrator could have found that "a *principal* purpose" of the transaction was to evade or avoid withdrawal liability.

The Court of Appeals and the District Court affirmed the Arbitrator's holding that Federal Express was not liable under *Santa Fe Pacific Corp. v. Central States, S.E. & S.W. Areas Pension Fund*, 22 F.3d 725 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 483 (1994). In *Santa Fe*, the Seventh Circuit held:

> The statutory criterion is . . . whether the avoidance of withdrawal liability by the seller (not necessarily by the purchaser as well) is one of the principal purposes of the transaction.

Santa Fe, 22 F.3d at 729-30. The Fund argues that to impose withdrawal liability, the Seventh Circuit's *Santa Fe* formulation requires a finding that a principal purpose of a transaction for the seller was to evade or avoid withdrawal liability. (Pet. at 19-20). In this case, the District Court properly distinguished the facts of *Santa Fe* and found it unsupportive of the Fund's position. (16a). The Court of Appeals affirmed the District Court's holding that the Arbitrator made no clear error in his findings on this issue. (17a).

After carefully examining the record evidence on Tiger's purpose in selling seventy-five percent (75%) of its stock in Hall's, Arbitrator Nagle decisively rejected the Fund's position as without substantial credible record support. (114a-135a). The District Court found that Arbitrator Nagle buttressed this conclusion with thorough and detailed findings of fact, which embrace the entire factual record relating to the origin and

evolution of the deal and the motives of each of the participants.[7] (16a).

Moreover, the Arbitrator specifically concluded that Tiger's reasons for selling Hall's were *"plausible and valid"* stating:

> . . . recognition of [a] the need to obtain wage concessions in return for an ESOP as a key ingredient for returning Hall's to profitability and the perceived difficulty of securing Teamsters agreement; [b] to such concessions as long as Hall's was owned by Tiger; [c] the belief that competitors were taking business from

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[7]These explicit factual findings included the following:

1. It was becoming very difficult for Tiger to provide the money to Hall's which it needed to continue to operate. (120a, 122a).
2. An essential key to turning Hall's around was to secure wage concessions from union employees in return for establishing an employee stock ownership plan ("ESOP"). (116a).
3. It would have been difficult to obtain union agreement to an ESOP with Tiger owning Hall's. (118a).
4. Bodford, the principal shareholder of the entity which acquired Hall's, agreed. (116a).
5. The delay occasioned by attempting to negotiate an ESOP while owned by Tiger may have put the Company in a position which would have discouraged any potential purchaser. (118a-119a).
6. Hall's had a greater chance of becoming profitable outside of Tiger's ownership. (119a).
7. Tiger had a reasonable expectation of lender unwillingness to provide additional monies for Hall's. (121a).
8. "It seems undeniable that Tiger sought to dispose of Hall's, at least in substantial part, because Hall's had for several years, been losing money, and Tiger was becoming increasdingly hard-pressed to provide the funds it would need. As the Third Circuit has recently observed, 'Disposing of an unprofitable operation is a legitimate business purpose.' *See Pension Benefit Guaranty Corp. v. White Consolidated Industries*, 998 F.2d 1192, 1202 (3d Cir. 1993), *quoting Chicago Truck Drivers, Helpers & Warehouse Workers Pension Fund v. Louis Zahn Drug, Co.*, 890 F.2d 1405 (7th Cir. 1989) (transaction designed to relieve [a party] of a part of its business that was producing significant losses is a bona fide sale)." (footnote omitted). (114a).

> Hall's by exploiting the negative image created by Tiger widely-publicized financial difficulties; and [d] the fact that Hall's was losing money and would need further cash infusions which Tiger was hard-pressed to provide and banks were reluctant to lend, thus represent the basic reasons advanced by Tiger for deciding to sell Hall's. *I find these to be entirely plausible and valid reasons.* (121a) (emphasis added).

In this context, *Santa Fe* actually *undermines* the Fund's position. The *Santa Fe* Court specifically recognized that if it is better to sell stock to preserve a company as a going concern rather than to sell the assets (and thereby trigger withdrawal liability under some circumstances), then it is reasonable to infer that withdrawal liability is only a minor factor in the decision to sell, if a factor at all. *Santa Fe*, 22 F.3d at 729.[8]

After summarizing and analyzing the testimony of both Tiger's expert witness, Dr. Linneman, and the Fund's expert witness, Mr. Hempstead, the Arbitrator specifically concluded that "[i]n view of these considerations, and my conclusion that at that time there were realistic prospects for the Company's continued viability, *I do not find that the sale of Hall's as a going concern, rather than its liquidation, reflected an evasive purpose.*" (132a) (emphasis added).

The Arbitrator and the District Court's analyses, affirmed by the Third Circuit, were correct under the standards articulated in both *Dorn's* and *Santa Fe*.

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[8]It is true that applying this formulation the Seventh Circuit set aside the arbitrator and the district court's conclusions in *Sante Fe* that there was no evasion or avoidance of withdrawal liability. It did so, however, only on a truly remarkable factual record of evasive intent which, as the District Court and the Arbitrator both held, was glaringly different from the record in the case at bar. (16a, 114a-135a).

B. The Fund's "Partnership Approach" Or "Accrual Theory" To Withdrawal Liability Is Mere Hyperbole And Is Simply An Attempt By the Fund To Distort Law.

The Fund advances a novel so-called "Partnership Approach" or "Accrual Theory" to withdrawal liability. The Arbitrator and the District Court correctly rejected this unsupported theory when it bore the earlier moniker of the "Accrual Theory". (21a, 141a). Resuscitated as the "Partnership Approach", it was again rejected by the Court of Appeals.

The theory has been rejected by every court that has considered it. Contrary to the Fund's position, the Arbitrator and the Courts' rejection of this theory hardly opens the floodgates to the "dumping" of pension liability. Nor does it present any other important public policy issue.[9]

As the District Court properly determined, the "Partnership/Accrual" theory proceeds on a flawed definition of the "employer" and then requires a further flawed analysis of *when* withdrawal liability arises. (19a-20a). The Fund's claim — that Tiger, a *former* controlled group member, is *both* the "successor" employer *and* the "original" employer responsible for

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[9]The Fund contends that the Third Circuit's decision will ". . . eviscerat[e] the prohibitions on evasion of pension liability", and ". . . places the public at risk on more than $80 Billion of unfunded pension liability. . . ." (Pet. at 23). That contention is totally unfounded and misguided. Congress has adopted a method for determining a company's liability for unfunded pension benefits. 29 U.S.C. §§ 1381-1461. The Third Circuit's decision in this case does not impact on that method, especially in light of the Arbitrator's dual analysis under the standards the Fund asserts are articulated in *Santa Fe* and *Dorn's*, *supra*. In enacting ERISA, Congress created a detailed structure to safeguard pensions. Federal Express painstakingly adhered to this structure and its procedural safeguards. The Fund now seeks to have this court rewrite ERISA in the guise of reviewing this decision simply because it wants to relitigate the results of three independent tribunals. Contrary to the Fund's contention, there is no threat to the public — Federal Express, the Fund, the Arbitrator, the District Court, and the Court of Appeals, by each requiring strict adherence to ERISA, made sure of that.

withdrawal liability — fundamentally misconstrues MPPAA, misapplies pertinent judicial and administrative interpretations, and cannot be squared with the plain terms of the Act. Not only is there no conflict among the circuits on this illogical theory, there is no legal support whatsoever for the Fund's "Accrual Theory". It has been thoroughly discredited.[10]

Arbitrator Nagle, a recognized expert in federal pension law, squarely rejected the Fund's "convoluted arguments", which selectively borrow inapplicable tax rules and partnership law to support the discredited "Accrual Theory".[11] The

[10]To uphold liability under MPPAA on the basis of the so-called "Accrual Theory" would, as one court stated in a case directly on point, require "engaging in legal gymnastics in order to guarantee pension plans at all costs." *Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Central Michigan Trucking Line*, 698 F.Supp. 698, 702 (W.D. Mich. 1987), *aff'd*, 857 F.2d 1107 (6th Cir. 1988). Such a result clearly was not intended by Congress. The "Accrual Theory" contradicts applicable law, which recognizes that only entities that are in the controlled group on the date of withdrawal may be responsible for withdrawal liability. *Id.*

[11]In rejecting the Fund's arguments on this issue, the Arbitrator held:

> This attempt [by the Fund] to fasten liability on former controlled group members is contrary to the so-called snapshot approach to withdrawal liability, under which liability extends only to the contributing entity and those who are members of its controlled group as of the date of withdrawal. This is the approach that has been adopted by the courts, including the Third Circuit in *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118 (3d Cir. 1986), as well as by the Pension Benefit Guaranty Corporation. Moreover, the Fund's Accrual Theory has been specifically rejected by the courts that have considered it, as lacking any support in the statute or its legislative history. *Teamsters Pension Trust v. Central Michigan Trucking, Inc.*, 698 F. Supp. 698 (W.D. Mich. 1987), *aff'd*, 857 F.2d 1107 (6th Cir. 1988); *Teamsters Pension Trust Fund v. Headley's Express and Storage Company*, 1993 WL 189933 (E.D. Pa. June 3, 1993).
>
> The Fund's convoluted arguments for its Accrual Theory — which to a significant degree are based on analogies to tax rules and other areas of law — have been discussed at length by the District Court and by the Sixth Circuit in their *Central Michigan Trucking* decisions, and I see nothing to be gained by repeating those analyses, with which I fully agree. (137a-138a).

Fund incorrectly asserts that the Third Circuit's rejection of the "Partnership Approach" or "Accrual Theory" conflicts with the Second Circuit's decision in *Trustees of Amalgamated Insurance Fund v. McFarlin's, Inc.*, 789 F.2d 98 (2d Cir. 1986). (Pet. at 25). *McFarlin's* is distinguishable. *McFarlin's* did not involve the determination of whether a successor or original employer could be held liable for withdrawal liability at all. It involved the question of whether an employee benefit plan's bankruptcy claim for withdrawal liability could properly be considered a priority claim under Section 507 of the Bankruptcy Code. *See* 11 U.S.C. § 507. In determining whether the claim could be classified as a priority claim under the Bankruptcy Code, the Court's analysis focused on the period of time in which the employees covered by the plan worked. *McFarlin's*, 789 F.2d at 103. The analysis is wholly inapplicable to the issue in this case, whether a company is *liable* for withdrawal liability under MPPAA.

This discredited approach to withdrawal liability involves no issue warranting review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE TRUSTEES OF TEAMSTERS PENSION FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY and CHARLES J. SCHAEFFER, JR., its administrator and fiduciary,
Petitioners,

v.

FEDERAL EXPRESS CORPORATION; THE FLYING TIGER LINES, INC.; WARREN TRANSPORTATION, INC.; TIGER INTERNATIONAL, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

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No. 96-1149

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans ("NCCMP") respectfully moves this Court for leave to file the accompanying Brief *Amicus Curiae,* in which we urge the Court to review the decision below.

At issue in this request for review is the proper standard for construing Section 1392(c) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1392(c), ("MPPAA") which permits trustees to disregard transactions undertaken by employers for the principal purpose of evading or avoiding withdrawal liability under the statute.

The Third Circuit's ruling in the case at bar is fundamentally at odds with the standard adopted by the Seventh Circuit, and lower courts as well as arbitrators are uncertain of the standard to apply, as the case law indicates. However, there are countless ways employers can restructure their businesses and, as the facts of this case reveal, millions of dollars of withdrawal liability are often at stake in "evade or avoid" disputes. Therefore, a misreading of this critical provision of the statute can have a substantial adverse effect on multiemployer plans. Thus, this appeal raises an issue of great national importance affecting the multiemployer plan community, generally, the participants and beneficiaries of multiemployer pension plans, employers who continue to select multiemployer plans as the vehicle for providing pension benefits, and the public at large, which can be presumed to have a significant interest in workers' receiving their anticipated benefits upon retirement.

As will be discussed further below, the NCCMP is well equipped to advise the Court on the issues raised by the Third Circuit's ruling and therefore files this Motion, as Petitioners have consented to the filing of an *amicus* Brief, but Respondents have not. The letters granting and refusing the NCCMP's request for consent have been filed with the Clerk of the Court.

INTEREST OF THE NCCMP

The NCCMP is a nonprofit, tax-exempt organization that was formed after the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA") to

participate in the development of employee benefits legislation and government regulations promulgated to implement ERISA and other laws affecting multiemployer plans. Currently, more than 240 multiemployer plans and related international unions, located in at least 37 states, are affiliated with the NCCMP. These affiliated plans not only represent a majority of participants in multiemployer plans around the nation, but are also representative of the multiemployer plan community generally.

Because of the broad range of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to state the position of the trustees, participants, and beneficiaries of such plans. For this reason, the NCCMP frequently participates as an *amicus curiae* before this Court as well as before the various courts of appeals. With regard to withdrawal liability assessments under MPPAA, the NCCMP has represented the interests of multiemployer plans in *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993); *Connolly v. PBGC*, 475 U.S. 211 (1986); and *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984). The NCCMP recently also filed an *amicus* Brief in *Board of Trustees, Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corporation of California* (No. 96-370), which is presently awaiting the views of the Solicitor General and a decision on the Petition. Additionally, the NCCMP has been recognized as having had a "significant impact" on MPPAA by the Senate cosponsors of that legislation. *See* 126 Cong. Rec. S9835 (daily ed. July 24, 1980) and S1010 (daily ed. July 29, 1980).

In the present case, the NCCMP respectfully requests this Court to adopt a uniform standard for interpreting Section 1392(c) of MPPAA. This is particularly critical, as Congress intended that "evade or avoid" disputes be

resolved in arbitration, and there are no binding arbitration precedents to assist arbitrators in their adjudicatory function. Therefore, considerable disarray exists at this time. Moreover, as "evade or avoid" disputes are generally complex and involve mixed questions of fact and law, it is frequently difficult for a reviewing court to evaluate whether the arbitrator correctly applied the presumption favoring the trustees' determinations. As federal courts also owe a substantial degree of deference to the arbitrator's factual findings, and it is often difficult to separate the factual findings from the arbitrator's legal conclusions, a uniform standard is needed to ensure that federal courts apply the presumption attaching to the arbitrator's decision in the manner required by this Court in *Concrete Pipe, supra.*

The NCCMP is concerned that unless this Court reviews the Third Circuit's decision, and adopts a uniform standard for interpreting Section 1392(c) along the lines suggested by the Seventh Circuit, further misreadings of the statute will occur which may deprive plans of millions of dollars of withdrawal liability. If this occurs, the plan-protective purpose of Section 1392(c) will be eroded and retirement benefits placed at risk.

As the above result is inimical to the financial health of multiemployer pension plans, the NCCMP, on behalf of all of its affiliated pension plans, requests leave to file an *amicus* Brief in support of the Petition for *Certiorari.* In analyzing the conflicting circuit court approaches, the NCCMP will focus its discussion upon the practical consequences which a misreading of Section 1392(c) will have for multiemployer plans, a topic on which the NCCMP is uniquely able to provide information.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
INTEREST OF THE NCCMP	4
SUMMARY OF REASONS FOR REVIEW	4
REASONS FOR REVIEW	7
I. THE STANDARD ESTABLISHED BY THE THIRD CIRCUIT IS INCONSISTENT WITH THE PURPOSES OF MPPAA, CONFLICTS WITH THE SOUNDER STANDARD APPLIED BY THE SEVENTH CIRCUIT, AND RENDERS SECTION 1392(c) INEFFECTIVE TO PROTECT MULTIEMPLOYER PLANS	7
A. The Third Circuit's Standard Is Inconsistent With the Purposes of MPPAA	7
B. The Third Circuit's Standard Conflicts With the Sounder Standard Applied by the Seventh Circuit	10
C. The Third Circuit's Standard Will Seriously Undermine the Plan-Protective Purpose of ERISA's Controlled-Group Definition of "Employer"	16
II. A UNIFORM STANDARD IS NECESSARY TO PROVIDE GUIDANCE TO ARBITRATORS AND COURTS AND TO DISCOURAGE FORUM-SHOPPING	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases Page

Banner Industries, Inc. and Central States, Southeast and Southwest Areas Pension Fund, 11 Employee Benefits Cas. (BNA) 1149 (January 22, 1989) (Graham, Arb.), *vacated by settlement*, 12 Employee Benefits Cas. (BNA) 1992 (1990) .. 12, 14, 17

Central States, Southeast and Southwest Areas Pension Fund v. Marquette Bank, 836 F. Supp. 673 (D. Minn. 1993) 15

Central States, Southeast and Southwest Areas Pension Fund v. Minneapolis Van and Warehouse, 764 F. Supp. 1289 (N.D. Ill. 1991) 15

Concrete Pipe and Products v. Construction Laborers Pension Trust, 508 U.S. 602 (1993) 4, 18

Connors v. Vick, 15 Employee Benefits Cas. (BNA) 1342 (S.D. W.Va. 1992) 15

Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia and Vicinity, 830 F.2d 1241 (3d Cir. 1987) 3

In re: The Sherwin-Williams Company and New York State Teamsters Conference Pension and Retirement Fund, 17 Employee Benefits Cas. (BNA) 2725 (February 7, 1994) (Gertner, Arb.) 10, 13, 14, 17

PBGC v. Ouimet Corp., 470 F. Supp. 945 (D. Mass. 1979) *aff'd*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981) 17

PBGC v. R.A. Gray & Co., 467 U.S. 717 (1984) 8

Santa Fe Pacific Corporation v. Central States, Southeast and Southwest Areas Pension Fund, 22 F.3d 725 (7th Cir. 1994) 5, 10, 11, 14, 17

Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp., 96 F.3d 1432 (3d Cir. 1996) (Table) 2

Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp., 20 Employee Benefits Cas. (BNA) 1050 (D. Del. 1995) 2

TABLE OF AUTHORITIES—Continued

Federal Statutes Page

29 U.S.C. § 1301(b)(1) 6, 16, 18
29 U.S.C. § 1369(b) 9, 11
29 U.S.C. § 1384 ..... 8, 14
29 U.S.C. § 1385(b)(2)(B) 8
29 U.S.C. § 1386(a) 9
29 U.S.C. § 1392(c) ..... *passim*
29 U.S.C. § 1398(1) 9, 11
29 U.S.C. § 1398(2) 8
29 U.S.C. § 1399(c)(1)(B) 9
29 U.S.C. § 1401(b)(2) 19
29 U.S.C. § 1401(c) 18
29 U.S.C. § 1405(a) 9
29 U.S.C. § 1405(b) 9
29 U.S.C. § 1451(d) 19

Other

126 Cong. Rec. 23038 (1980) 10

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

At issue in this request for review is the proper standard for determining, under Section 1392(c) of the Multiemployer Pension Plan Amendments Act of 1980

("MPPAA"),[1] whether a transaction may be disregarded if a principal purpose of the transaction was to evade or avoid withdrawal liability.

In affirming the district court's opinion (without a separate opinion),[2] the Third Circuit has endorsed, as the governing precedent for the circuit, a standard that is inconsistent with the general remedial purposes of MPPAA as well as with the statute's specific antidumping objective, as reflected in Section 1392(c) and in other provisions as well, *infra*. Thus, the decision is adverse not only to the interests of multiemployer plans and their participants and beneficiaries, but also to contributing employers who do not withdraw (and will be left to fund shortfalls likely to result from the evisceration of Section 1392(c)). As well, the decision may prompt employers who might otherwise consider selecting a multiemployer plan as the vehicle through which to provide retirement benefits to their employees to reject this option due to the risk of additional liability, despite the significant economies of scale provided by such plans.

Specifically, the Third Circuit has endorsed a rule under which—at least in the context of the sale of a business—in order for the plan to collect the money due under MPPAA, the plan sponsor (*e.g.*, trustees of multiemployer plans) will need to prove not only that the seller intended to evade or avoid withdrawal liability, but that the buyer

---

[1] Pub. L. No. 96-364. Further references to MPPAA will be to Title 29, U.S.C. 29 U.S.C. § 1392(c) provides: "If a principal purpose of a transaction is to evade or avoid withdrawal liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction."

[2] The Third Circuit's order is reported in table form as *Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp.*, 96 F.3d 1432 (3d Cir. 1996) (Table). The district court's opinion is published as *Trustees of Teamsters Pension Trust Fund of Philadelphia and Vicinity v. Federal Express Corp.*, 20 Employee Benefits Cas. (BNA) 1050 (D. Del. 1995).

and seller were in collusion, the intent on both sides amounting to a conspiracy to defraud a pension plan. Although, as will be discussed below, the burden of persuasion is on the employer to prove by a preponderance of the evidence it did not have a principal purpose to evade or avoid withdrawal liability in a sale, the practical result of the Third Circuit's ruling is that, to prevail, it is the **trustees** who will be required to prove that no plausible and valid reasons existed for the transaction other than to avoid obligations to the plan; in essence, to prove that **the** primary purpose of the transaction on the part of an employer-seller was to evade or avoid withdrawal liability and that the buyer knew of this intent and colluded in it.

The National Coordinating Committee for Multiemployer Plans ("NCCMP") files this Brief as *amicus curiae* out of concern that unless the Third Circuit's ruling is reviewed and reversed, a standard of proof will be established with respect to determinations to be made under Section 1392(c), under which trustees will seldom (if ever) prevail; there will always be some plausible and valid reason for the sale of a business (or other commercial transaction) other than to evade or avoid withdrawal liability.

Moreover, as Congress intended that the resolution of "evade or avoid" disputes be resolved in arbitration, *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 830 F.2d 1241 (3d Cir. 1987), and as federal courts owe a substantial degree of deference to the arbitrator's findings, the NCCMP believes it is critically important for this Court to establish a uniform standard for determining whether a principal purpose of a commercial transaction was to evade or avoid withdrawal liability. A uniform standard is necessary to provide guidance to arbitrators around the country and to discourage forum-shopping by employers contesting an arbitration award. It will also serve as a guide for employers in planning corporate transactions.

Thus, the NCCMP respectfully urges this Court to review the decision below to resolve the conflict which presently exists between the Third and Seventh Circuits by adopting the sounder and more practical approach taken by the Seventh Circuit. This will ensure that Section 1392(c) retains the plan-protective purpose it was intended to serve and that the statutory presumptions upheld by this Court in *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), are properly applied in "evade or avoid" disputes (which are factually complex and usually involve mixed questions of fact and law).

INTEREST OF THE NCCMP

The interest of the NCCMP has been stated in the attached Motion for Leave to file this Brief and is incorporated herein by reference.

SUMMARY OF REASONS FOR REVIEW

1. MPPAA was enacted to protect the financial soundness of multiemployer pension plans, and therefore the reliance interest of workers in their vested retirement benefits. To effectuate this goal, the statute requires employers withdrawing from multiemployer plans to pay their fair share of the plan's liability for unfunded vested benefits. While the statute contains a number of mitigating provisions that accommodate federal labor law principles as well as *bona fide* commercial transactions by exempting certain events from withdrawal liability, Congress did not intend to insulate employers from their statutory funding obligation if an employer engages in a transaction for a principal purpose of evading or avoiding withdrawal liability. Accordingly, Section 1392(c) expressly permits such transactions to be disregarded.

Significantly, as revealed both in the language of the provision and in its legislative history, Congress did not intend to limit the reach of Section 1392(c) only to trans-

actions having no economic substance or in which both parties collude to defraud a plan. Therefore, even if independent economic reasons justify the transaction, it may still be disregarded unless the employer shows by a preponderance of the evidence that withdrawal liability concerns were a minor, and not a principal, consideration. The Third Circuit's standard, which would require evasion or avoidance to be **the** principal purpose of the challenged transaction, is inconsistent with the plan-protective purpose of Section 1392(c) as well as with the remedial purpose and structure of MPPAA, *inter alia*, because it shifts the burden to the trustees to prove that no plausible and valid reasons existed for the transaction other than to avoid withdrawal liability.

2. By requiring the transaction to be a sham or fraud, in which both parties collude, the Third Circuit's standard conflicts with the sounder standard applied by the Seventh Circuit in *Santa Fe Pacific Corporation v. Central States, Southeast and Southwest Areas Pension Fund*, 22 F.3d 725 (7th Cir. 1994). The NCCMP endorses the analysis of the Seventh Circuit, which provides the basis for a uniform standard without establishing a *per se* rule that would invalidate all stock sales. Reviewing the totality of facts and circumstances presented to the arbitrators, including the various possibilities available to the parent to rid itself of a financially troubled subsidiary, the court concluded that the transaction could be disregarded because divestiture would not have been effectuated through a sale of stock absent the prospect of withdrawal liability. This is an eminently practical approach.

3. The Third Circuit erred in concluding that a buyer must know of a seller's intent to evade or avoid withdrawal liability, and collude in it, for the transaction to be disregarded. The term "transaction," as used in Section 1392(c), does not require both parties to have the same knowledge and intent, no less the same fraudulent intent. Moreover, there are countless reasons why a buyer would

agree to purchase a failing company, without regard to actual or contingent withdrawal liability. The NCCMP concurs with those courts and arbitrators who have ruled that a buyer's knowledge and intent are irrelevant.

4. The Third Circuit's lenient standard, under which trustees will seldom (if ever) prevail, will also serve to erode the plan-protective purpose of Section 1301(b)(1), which treats all trades and business under common control as a single employer for all purposes of withdrawal liability. As in the case at bar, parent companies will be only too eager to sever their connection with a failing subsidiary to avoid joint and several liability for withdrawal liability debt. Thus, contrary to Congress's intent, the funding burden will be shifted to other employers, and/or retirement benefits will be placed at risk.

5. "Evade and avoid" disputes were intended to be resolved in arbitration. However, because of the difficulties in applying the statutory presumptions and the fact that arbitrations are not only complex but involve mixed questions of fact and law, a uniform standard is necessary to guide arbitrators and reviewing courts. Such a standard will help to ensure that the statutory presumption favoring the trustees' determinations is properly applied and that the presumption in favor of the arbitrator's decision does not end up harming plans in a manner which Congress did not intend. A uniform standard will also discourage forum-shopping.

REASONS FOR REVIEW

I. THE STANDARD ESTABLISHED BY THE THIRD CIRCUIT IS INCONSISTENT WITH THE PURPOSES OF MPPAA, CONFLICTS WITH THE SOUNDER STANDARD APPLIED BY THE SEVENTH CIRCUIT, AND RENDERS SECTION 1392(c) INEFFECTIVE TO PROTECT MULTIEMPLOYER PLANS.

A. The Third Circuit's Standard Is Inconsistent With the Purposes of MPPAA.

On September 26, 1980, MPPAA was signed into law to expand and enhance the protections of ERISA. In particular, Congress sought to protect the financial soundness of multiemployer pension plans by requiring employers to continue to fund the plans to which they had formerly contributed after those employers no longer had an obligation to contribute pursuant to written agreements (*e.g.*, collective bargaining agreements) or permanently ceased covered operations.

Central to passage of MPPAA was the fact that the Pension Benefit Guaranty Corporation, which does not receive its funding from Congress, would not have been able to guaranty the payment of vested retirement benefits for participants in multiemployer plans unless those plans had been charged unacceptably high premiums. Therefore, either participants would have been placed at risk with regard to their retirement benefits, or the burden of underfunding would have fallen on nonwithdrawing employers, as those employers would have been called upon to pay increased contribution rates, possibly prompting them to withdraw too. It was believed at the time that these forces would ultimately have resulted in massive plan terminations. Accordingly, Congress determined that employers—after withdrawal—should continue to pay their fair share of the plan's liability for unfunded vested benefits.

As this Court has emphasized in numerous decisions upholding the constitutionality of MPPAA, the fundamental goal of the legislation was to assure that workers and their families actually receive the retirement benefits upon which they relied, as long as the worker fulfilled the conditions required by the plan to obtain a vested benefit —a goal that could not be achieved in the long term if employers remaining in the plan were left "holding the bag" for funding deficiencies left by employers leaving the plan. *See, e.g., PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984).

Although MPPAA was designed to protect participants and beneficiaries by requiring employers withdrawing from multiemployer plans to continue to fund the plans, the statute nevertheless contains a number of mitigating provisions that accommodate federal labor law principles as well as *bona fide* commercial transactions, and reduce employers' liability burdens in the event an exemption from withdrawal liability does not apply.

With regard to labor law principles, for example, an employer does not withdraw solely because it suspends contributions during a labor dispute, 29 U.S.C. § 1398 (2), or if it substitutes one collective bargaining agreement for another agreement requiring the employer to contribute to the same plan. 29 U.S.C. § 1385(b)(2)(B).

With respect to commercial transactions, an employer does not withdraw from a plan—either completely or partially—by selling its assets if the seller and buyer comply with certain statutory requirements which reasonably ensure that contributions to the plan will continue uninterrupted. 29 U.S.C. § 1384.[3] Likewise, an employer

[3] Absent this rule, a sale of assets would result in a withdrawal even if the buyer assumed the seller's collective bargaining agreement and continued to make contributions, because the seller will have permanently ceased to have an obligation to contribute and/or has ceased covered operations. Four requirements must be met, as of the time of the sale, for the exemption to relieve the seller

does not withdraw as the result of a change in corporate structure (such as a merger, consolidation, or division) if the change does not cause an interruption in contributions or in the obligation to contribute. 29 U.S.C. § 1398(1); 29 U.S.C. § 1369(b). Thus, a sale of stock does not necessarily result in a withdrawal.[4]

However, Congress did not intend to insulate employers from withdrawal liability if an employer engages in any kind of transaction for a principal purpose of evading or avoiding its statutory liability to the plan. Thus, Section 1392(c) expressly provides that transactions having such a purpose must be disregarded, and authorizes trustees to determine and collect withdrawal liability as if the transaction to avoid it had not occurred.

Significantly, as explained in the legislative history of Section 1392(c), and as reflected in the broad but straightforward language of the text, such a transaction need not

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of liability: (1) the assets must be sold to an unrelated party in an arms'-length transaction; (2) the buyer must contribute to the plan for substantially the same number of contribution base units (*e.g.*, hours worked) as did the seller with respect to the covered operations; (3) the buyer must guarantee such contributions by posting a bond or by placing an amount in escrow; and (4) the contract of sale must impose secondary withdrawal liability on the seller and stipulate that the sale is executed in compliance with the sale of assets rule. The effect of the rule is that the buyer assumes the contribution history of the seller for the plan year of the sale and the preceding four plan years. However, the seller remains liable for the 5-plan-year period if the buyer withdraws during that period and fails to satisfy its withdrawal liability obligations to the plan.

[4] Other mitigating provisions of the statute include: Section 1386(a) (*de minimis* rule insulating small employers from withdrawal liability assessments below a threshold amount); Section 1399(c)(1)(B) (20-year cap on payments even if it would take longer to amortize the debt); Section 1405(a) (reduction of withdrawal liability following a sale of assets which does not qualify for an exemption); and Section 1405(b) (limitation of withdrawal liability for insolvent employers undergoing liquidation or dissolution).

rise to the level of a sham, a fraud, or a conspiracy. Rather, as stated by Representative Frank Thompson, a House cosponsor of the bill, "[t]his rule is to apply when evasion of liability is *a* principal purpose of a transaction *whether or not the transaction has other purposes as well.*" 126 Cong. Rec. 23038 (1980) (emphasis added). As Representative Thompson further explained, "we intend that employers not be able to evade or avoid withdrawal liability through changes in identity, form, or control, or through transactions that are less than *bona fide* and arm's length." *Id.* As pointed out by the arbitrator in *In re: The Sherwin-Williams Company and New York State Teamsters Conference Pension & Retirement Fund*, 17 Employee Benefits Cas. (BNA) 2725, 2748-49 (February 7, 1994) (Gertner, Arb.), Congress used the phrase "evade **or** avoid," with only the former term suggesting a fraudulent or deceptive intent.

The Third Circuit's ruling, which would establish a standard requiring fund trustees to prove that there were no plausible and valid reasons for a transaction other than to avoid withdrawal liability; *i.e.*, that *the* only purpose of the transaction was to evade or avoid withdrawal liability, is inconsistent with the text and plan-protective purpose of Section 1392(c), as well as with the statutory scheme in general. Most strikingly, the statutory exemptions do not leave employers scot-free to engage in commercial transactions without also requiring significant economic protection for the plan.

B. The Third Circuit's Standard Conflicts With the Sounder Standard Applied By the Seventh Circuit.

In contrast to the Third Circuit's approach, the Seventh Circuit's analysis of Section 1392(c) in *Santa Fe Pacific Corporation v. Central States, Southeast and Southwest Areas Pension Fund*, 22 F.3d 725 (7th Cir. 1994) reflects Congressional intent in enacting this provision. It also provides a lucid, practical basis for establishing a

readily-applicable test to determine whether or not a transaction should be disregarded.

The issue in *Santa Fe Pacific*, as in the case at bar, was whether a parent company's sale of an ailing subsidiary which contributed to a multiemployer plan should be disregarded as a transaction to evade or avoid withdrawal liability. In both cases, the subsidiary, a trucking company, was losing money, in part because of changes in the transportation industry as the result of deregulation. Thus, in both cases, economic reasons unrelated to withdrawal liability existed, justifying the parent company's desire to get rid of its subsidiary. In contrast to the Third Circuit, however, the Seventh Circuit found that these other reasons—even if independent and compelling—were irrelevant if the evidence indicated that a principal purpose of the sale was to escape withdrawal liability.

To determine whether "a principal purpose" existed, the court focused on the method selected by the parent to divest itself of the subsidiary, noting that various commercial options would have been possible, including liquidation, partial liquidation, an asset sale, or a stock-sale. Observing that a sale of assets would have brought a higher price than a sale of stock, the court concluded that the inference was "irresistible" that millions of dollars of potential withdrawal liability figured heavily in the company's decision to sell its stock; in other words, "but for" MPPAA, the parent company would have sold the subsidiary's assets.

The court clearly recognized that Congress did not intend to establish a rule under which a parent could never sell the stock of a subsidiary contributing to a multiemployer plan without subjecting itself to actual or contingent withdrawal liability. Significantly, therefore, the court did not establish a standard in which a sale of stock would be *per se* a transaction to evade or avoid withdrawal liability (which, indeed, would be inconsistent with Section 1369(b) of ERISA and 1398(1) of MPPAA

relating to changes in corporate structure or identity). Instead, the court indicated that the sale of stock might *not* have been a transaction which the trustees could disregard under Section 1392(c), if Santa Fe had been able to prove or persuade by a preponderance of the evidence that the divestiture would have been accomplished through a stock sale whether or not MPPAA had been passed; for example, if Santa Fe had been able to demonstrate that its subsidiary would have had greater value as a going concern than on the auction block and that the sale of stock would have been a more feasible method of preserving the subsidiary as an intact concern than a cash sale of the assets. However, since the evidence indicated that the subsidiary was worth considerably more as a conglomeration of its assets than as a going concern, the court—after examining all of the possibilities for divestiture—found that the arbitrator was not "justif[ied] in concluding that the avoidance of withdrawal liability was not one of the principal purposes of the transaction." 22 F.3d at 730.

Consistent with this analysis, which establishes a straightforward "but for" test, following a review of the totality of the circumstances, the Seventh Circuit also flatly rejected the proposition that a transaction must be a sham and devoid of economic substance in order for it to be disregarded under Section 1392(c). In contrast to the Third Circuit, the court therefore found it "irrelevant" for the arbitrator to consider such issues as whether the parent knew that the purchaser of the subsidiary would fail. As such questions go to the *bona fides* of a transaction, the court's rejection of what is essentially a "good faith" defense is, of course, merely the corollary of the court's conclusion that Section 1392(c) does not require evasion or avoidance of withdrawal liability to be *the* principal purpose, but only *a* principal purpose of the transaction.

To the same effect, *see also Banner Industries, Inc. and Central States, Southeast and Southwest Areas Fen-*

sion Fund, 11 Employee Benefits Cas. (BNA) 1149 (January 22, 1989) (Graham, Arb.), *vacated by settlement,* 12 Employee Benefits Cas. (BNA) 1992 (1990). Here, the arbitrator disregarded the stock sale of a failing subsidiary, a trucking company, to an Employee Stock Option Plan (ESOP), and upheld the plan's withdrawal liability assessment against the seller, after the former subsidiary went into bankruptcy and withdrew two years after the sale. The arbitrator rejected the economic substance/good-faith requirement, stating that "[a] case can always be made that there existed some possibility for survival of an enterprise, however remote. . . . Congress could scarcely have sought to protect the integrity of pension funds and benefits for active and prospective pensioners merely with the hope an entity would survive." 11 Employee Benefts Cas. (BNA) at 1181. The arbitrator also pointed out that such an interpretation would lead to impermissible manipulation, observing that "[i]f Banner were to prevail in this dispute, it would sanction an interpretation of the statute which would enable an employer to rid itself of a failing subsidiary by propping it up for some, unspecified, length of time as long as it can subsequently demonstrate that the subsidiary had some possibility of survival." *Id.*

The Third Circuit's conclusion that the buyer as well as the seller must have an intent to evade or avoid withdrawal liability was also soundly rejected by a well-respected arbitrator in *In re: The Sherwin-Williams Company and Teamsters Conference Pension Fund, supra,* which also involved the divestiture by a parent of a financially troubled trucking company subsidiary:

> *This conclusion* [here, made by the employer] *is rejected.* The removal of liability is a seller's concern, but often a buyer takes little or no issue with the fact of this contingent obligation. To require both parties to the transaction to have an affirmative intent would emasculate the Congres-

> sional intent behind Section 4212(c) [29 U.S.C. § 1392(c)].

17 Employee Benefits Cas. (BNA) at 2749 (emphasis in original). There are countless business reasons why a buyer would purchase a company without regard to contingent withdrawal liability, even if the company is financially troubled; for example, to get the business cheap and thereby secure a customer base or management contract; to eliminate competition in a geographical area; to preserve management jobs at least for some period of time; or to use the company's losses for tax advantages. Moreover, the buyer might not perceive contingent withdrawal liability as being much of a risk, as it is a well-established fact of economic life that multiemployer plans generally recover very little (if any) withdrawal liability in the event of a bankruptcy.

For all of these reasons, the NCCMP endorses the analyses in *Santa Fe Pacific*, *Banner Industries*, and *Sherwin-Williams*, and submits that the Third Circuit has taken too literal a view of the term "transaction," as used in Section 1392(c). Although the term suggests that there must be more than one party to a deal, the Third Circuit's "good faith" defense to an "evade or avoid" claim injects a statutory requirement into the text which is simply not there. There is nothing in the term "transaction," which is much broader than the term "contract," that requires both parties to have either the same knowledge or the same intent, much less the same deceptive intent. Moreover, had Congress wished Section 1392(c) to encompass the knowledge and intent of a party other than an employer seeking to evade or avoid withdrawal liability, it could have so specified, as it did in the sale of assets exemption which imposes obligations on the buyer as well as the seller for the exemption to apply. 29 U.S.C. § 1384. However, as Congress did not intend to limit the application of Section 1392(c) to

sham transactions, as the text and legislative history indicate, there was no need to do so.

Additionally, while the case at bar centers upon the sale of a business, Section 1392(c) also applies to other scenarios, including evasion of a plan's collection efforts. In this context, the requirement that both sides of the transaction be aware of the employer's desire to evade or avoid withdrawal liability and collude in it is particularly problematic. For example, an employer may have conveyed assets to shareholders, as ostensible repayments of the shareholders' equity, with a principal purpose of making those assets unavailable to satisfy a plan's assessment of withdrawal liability. In many cases, the shareholders may have no knowledge of the fact of the assessment, let alone the employer's motivation to avoid it.[5] Nevertheless, under the Third Circuit's rationale, Section 1392(c) would not apply.

Moreover, the range of possible means of evasion covers all tricks by transfer known to the common law of fraud, such as gifts or "sales" to family and friends. The Third Circuit's rule places such transfers—even without consideration—beyond recovery absent proof that the recipient of the gift participated in the transactions with a conscious and admitted intent to help the seller evade withdrawal liability. As some courts have held that state-law remedies for fraud are preempted,[6] and donees may

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[5] *See Connors v. Vick*, 15 Employee Benefits Cas. (BNA) 1342 (S.D. W.Va. 1992) (real estate conveyance to spouse not permitted to defeat collection efforts of plan against individual employer in spite of spouse's alleged lack of knowledge); *Central States Southeast and Southwest Areas Pension Fund v. Minneapolis Van and Warehouse*, 764 F. Supp. 1289 (N.D. Ill. 1991) (shareholder's lack of knowledge no defense to plan's claim for withdrawal liability payments against dissolved corporation whose assets were distributed to shareholder; knowledge not precondition for imposition of withdrawal liability).

[6] *Central States, Southeast and Southwest Areas Pension Fund v. Marquette Bank*, 836 F. Supp. 673 (D. Minn. 1993) (state remedies for fraudulent conveyances preempted).

have no inclination to look behind the transaction, the Third Circuit's rule would deprive multiemployer plans of a remedy under federal law for fraudulent transactions to evade withdrawal liability.

Clearly, review of this aspect of the Third Circuit's standard is urgent, as courts and arbitrators are already in conflict as to the role which good faith should play in interpreting Section 1392(c), and a misreading of the provision will have drastic consequences for multiemployer plans, as evidenced by the facts of this case.

C. The Third Circuit's Standard Will Seriously Undermine the Plan-Protective Purpose of ERISA's Controlled-Group Definition of "Employer."

Section 4001(b)(1) of ERISA, 29 U.S.C. § 1301 (b)(1), provides that all trades or businesses under common control are to be treated as a single employer for all purposes of Subchapter III (which includes the withdrawal liability provisions of MPPAA).

Controlled groups consist of three types: parent-subsidiary, brother-sister, and combined controlled group. However, whether any of these controlled groups exist is determined exclusively on the basis of common ownership interests under applicable Treasury Regulations; common management, employees, lines of business, or similar economic factors are irrelevant. Accordingly, an entity contributing to a multiemployer plan will be a component member of a controlled group if it is a subsidiary, a parent, or has owners in common with one or more other trades or businesses—whether or not any of the other businesses is also a contributing employer.

If a contributing entity permanently ceases to have an obligation to contribute to a plan, or permanently ceases covered operations, its membership in a controlled group and/or the characteristics of the other members of the group will determine whether a withdrawal from a plan

has occurred; whether the withdrawal is partial or complete; the date of withdrawal; the amount of withdrawal liability; and the entities from which the liability can be collected. Depending on the facts, the controlled group definition of "employer" can result in a determination that no withdrawal has occurred.

Conversely, the controlled group definition is of singular financial importance within the statutory scheme because it enables the trustees to collect an assessment from solvent members of the group if the contributing entity has insufficient assets. That this is often the case is evident from the facts at bar, as well as from the facts in *Santa Fe Pacific, Banner Industries, and Sherwin-Williams, supra.* As those cases reveal, however, Section 1392(c) precludes parent corporations or other owners from ousting the contributing employer from the group to protect the other members' financial interests if a principal purpose of the transaction selected for divestiture is to evade or avoid actual or contingent withdrawal liability. However, the more lenient the standard is for making this determination, the easier it will be for the solvent member or members of a controlled group to dump a contributing employer by severing its connection with the group, thereby undermining the fiscal integrity of the plan or shifting the funding burden to other contributing employers. That Congress acted rationally in imposing joint and several liability on members of a controlled group was settled long ago in the context of single employer plans. *See PBGC v. Ouimet Corp.*, 470 F. Supp. 945 (D. Mass. 1979), *aff'd*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). The same principles apply to controlled group liability in the context of multiemployer plans.

The NCCMP submits that the Third Circuit's lenient standard for interpreting Section 1392(c), under which it will be nearly impossible for trustees to sustain a claim, will seriously undermine the plan-protective purposes of

Section 1301(b)(1), which is a cornerstone of the statute. For this reason, too, the NCCMP requests review.

II. A UNIFORM STANDARD IS NECESSARY TO PROVIDE GUIDANCE TO ARBITRATORS AND COURTS AND TO DISCOURAGE FORUM-SHOPPING.

Congress intended that "evade or avoid" disputes be resolved in arbitration. While either party may contest the decision, federal court review is limited. As provided in Section 1401(c): "In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct."

As the cases discussed above indicate, the factual records in arbitrations involving "evade or avoid" disputes tend to be very long, detailed, and complex. Moreover, as Congress intended the arbitrator to function as a kind of judge within the statutory scheme, the arbitrator's conclusions necessarily involve mixed questions of fact and law. Hence, it is frequently difficult to ascertain whether a conclusion is one of fact or law. This, in turn, makes it difficult for reviewing courts to assess how the arbitrator applied the presumption attaching to the plan sponsor's determinations and to review the arbitrator's decision in the manner required by this Court in *Concrete Pipe, supra*. As the case at bar reveals, the arbitrator correctly stated the standard of review applicable to the trustees' determination that Tiger's divestiture of Hall's was a transaction to evade or avoid withdrawal liability; however, rather than according the trustees' determination a presumption of correctness and shifting the burden to the employer to demonstrate the absence of such a purpose, he allowed the burden to remain with the trustees by requiring them to show that no plausible and valid reasons existed for the stock sale, even though the timing of the sale, the consideration paid for the stock, the

existence of other possibilities to get rid of Hall's, and the fact that the buyer was an insider raised an "irresistible" inference that Tiger divested itself of Hall's in the manner it did for a principal purpose of evading withdrawal liability. Because the arbitrator stated the correct standard of review, the district court allowed the decision to stand, and the Third Circuit affirmed.

Compounding the inherent difficulty of applying the presumptions in factually complicated situations and applying the law to the facts, is the reality that arbitrators are often not lawyers, come from different backgrounds, have different types and levels of experience, and do not apply the "common law of the shop," as in labor arbitration. Moreover, arbitrators have no overall agency structure for policy guidance and neither the statute nor the regulations provide any basis for an arbitrator to identify the circuit whose law should control the decision in a particular case. Thus, a uniform standard for interpreting Section 1392(c) to assist the arbitrator in evaluating the evidence presented by the plan and the employer is urgently needed to avoid the disarray that presently exists, and to prevent the presumption favoring arbitrators' decisions from harming plans in a manner that Congress did not intend and probably did not anticipate.

Further, while arbitration decisions are reviewable in "an appropriate United States court in accordance with Section 1451," 29 U.S.C. § 1401(b)(2), there is nothing in the statute requiring either party to proceed in the same jurisdiction in which the arbitration took place. MPPAA's venue provision, Section 1451(d), 29 U.S.C. § 1451(d), states only that an action may be brought where the plan is administered or where a defendant resides or does business. Employers and plans can therefore be expected—to the extent possible—to race to a court in the jurisdiction having the most favorable precedent after an unfavorable award. As employers having

the largest liability may be national employers doing business all over the country, such a result could have a substantial adverse impact on multiemployer plans. A uniform standard is needed to discourage forum-shopping.

Section 1392(c) has become the focus of the largest withdrawal liability disputes. A uniform standard of liability under this Section will aid arbitrators and the courts in the disposition of cases. As important, it will provide plans and their contributing employers with necessary guidance for planning and structuring business transactions with pension implications and reduce or limit litigation in this area. The NCCMP submits that a uniform standard for interpreting this provision is necessary, and that guidance can come only from this Court. The NCCMP therefore requests this Court to review and reverse the decision of the Third Circuit, and to adopt either the standard applied by the Seventh Circuit or a similar standard equally protective of multiemployer plans.

CONCLUSION

For the reasons stated above, the NCCMP requests the Court to grant the Petition and to review and reverse the decision below.

Respectfully submitted,

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February 20, 1997

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No. 96-1149

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY; TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY AND CHARLES J. SCHAFFER, JR., its administrator and fiduciary,

Petitioners,

v.

FEDERAL EXPRESS CORPORATION;
THE FLYING TIGER LINES, INC.;
WARREN TRANSPORT, INC.;
TIGER INTERNATIONAL, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY BRIEF

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13 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY	1
CONCLUSION	4
SUPPLEMENTAL APPENDIX:	
Letter of Arbitrator Robert E. Nagle, July 6, 1993	SA-1

TABLE OF AUTHORITIES

Cases Page

Banner Industries, Inc. -and- Central States, S.E. & S.W.A. Pension Fund, 11 Employee Benefits Cas. (BNA) 1149 (Graham, Arb. 1989) 5

Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund of Philadelphia and Vicinity, 787 F.2d 897 (3d Cir. 1986) 2, 5

Santa Fe Pacific Corp. v. Central States, S.E. & S.W.A. Pension Fund, 22 F.3d 725 (7th Cir. 1994) 1

The Sherwin-Williams Company -and- New York State Teamsters Conf. Pension and Retirement Fund, 17 Employee Benefits Cas. (BNA) 2725 (Gertner, Arb. 1994) 5

Other

26 C.F.R. § 1.414(c)-2(b)(2) 4

26 C.F.R. § 1.414(c)-2(c) 4

29 U.S.C. § 1392(c) 5

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PETITIONERS' REPLY BRIEF

The Brief in Opposition falls flat with the District Court's conclusion that "[a]lthough the parties disagree on the inferences to be drawn from the facts, the basic sequence of events is undisputed." Petition, p. 7a n.1. See also, Petition, p. 23 and cases cited (no deference to inferences). The District Court concluded that "[i]n both *Santa Fe* [*Pacific Corp. v. Central States, S.E. & S.W.A. Pension Fund*, 22 F.3d 725 (7th Cir. 1994)] and this case, the evidence established that an assets sale would have been more profitable to the parent company but for

the potential withdrawal liability." Petition, p. 15a.[1] The court nonetheless confirmed the Nagle award because "the arbitrator correctly relied on *Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 787 F.2d 897 (3d Cir. 1986)," Petition, p. 13a, and "*Santa Fe* . . . . is not controlling law in this circuit." Petition p. 16a. The Third Circuit endorsed this legal analysis in affirming "essentially for the reasons set forth in the District Court's opinion." Petition, p. 3a.

In more candid comments before oral argument, the Arbitrator conceded as much:

> 1. Tiger's evidence supporting the proposition that sale of Hall's was necessary in order to achieve an ESOP or obtain additional lender support seems rather thin. Moreover, under all the circumstances it seems somewhat implausible that Cronin and Tiger management would not have had greater awareness than has been represented regarding the full significance of Hall's potential MPPAA liability.
>
> * * * *
>
> 2. . . . The Lafferty memorandum suggests that Cronin had greater concern regarding Hall's MPPAA liability than Cronin has acknowledged, . . .
>
> * * * *
>
> 5. Arguably the case can be made that absent MPPAA, Tiger could have done better by liquidating Hall's rather than selling it as a going concern, at

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[1] The District Court noted that a sale of assets under 29 U.S.C. § 1384 would not trigger withdrawal liability—but would leave Tiger with exposure for withdrawal liability for the next five years. Petition, p. 15a, n.5. A sale of assets could offer closure, a definite valuation, a retained minority interest in the new company and everything else cited as reasons for the stock "sale." The stock "sale" was the only vehicle which promised a complete escape from withdrawal liability. This was critical in the face of an expected Hall's bankruptcy and withdrawal in early 1985 and consequent default under the Override Agreement, Petition, pp. 80a, 124a-125a, which Tiger would have to disclose before the public offering in February 1985.

> least under the terms that it did. Once withdrawal liability is taken into account, however, liquidation would seemingly have been foolhardy.

See Petitioner's Reply Brief, Supplemental Appendix, pp. SA-2, SA-3. An individual, faced with an impending judgment and foreclosure, is equally "foolhardy" if he does not sell his home to a relative or friend for $1 with the hope that he may thus avoid foreclosure and perhaps regain the house once the threat has passed. Neither the sale of the home for $1 nor Tiger's gift of Hall's to Bodford at a net cost of over $1 Million in closing expenses makes economic sense for a seller absent a desire to avoid a legal debt obligation. *Santa Fe* correctly concludes that such actions lie within the core definition of fraud.

The arbitrator confirmed all of the "facts" necessary to liability under the test applied by *Santa Fe* and the Fund. He acknowledged that Tiger management was fully aware of withdrawal liability as it had been documented each year by Arthur Andersen, the outside auditor for both Hall's and Tiger, Petition, p. 80a, n. 2. For entirely unexplained reasons, the arbitrator completely omits reference to a May 10, 1984 memo by Robert Harter, the bankruptcy lawyer and legal architect of the Hall's sale for Tiger, which sparked the process by noting a potential foreclosure on Hall's and that "Tiger's exposure results from Hall's $35,000,000 multiemployer pension plan liability."

Tiger admittedly rejected higher offers which did not promise to assume withdrawal liability. It rejected an offer of $15 Million (plus the debt secured in the Bodford gift) for Halls from Bodford in the summer of 1984, Petition, p. 89a. It likewise turned its back on an offer from Whit Lee of $15 Million or more in December 1984, Petition, p. 87a. It instead offered to pay $1 Million in closiing costs to have Bodford take the withdrawal liability off its hands for $1,000, Petition, pp. 88a

(Lee Offer), 89a-90a (ultimate Bodford deal matching Lee proposal for withdrawal liability assumption). This price makes no sense unless the existing equity in Hall's of $28 Million or more, see, Petition, pp. 86a, 132a, n. 14 & 53a, was more than offset by an expected addition of a current withdrawal liability debt to the balance sheet.

The arbitrator expressly confirmed the Fund's central conclusion that the "sale" was primarily done to enhance Tiger's position in an expected Hall's bankruptcy.

> . . . the $1,000 received from Bodford is clearly not the significant consideration for this transaction. Rather, the real consideration included the secured commitments to pay the $10.5 Million owed by Hall's to Tiger. . .

Petition, p. 131a.[2] The security interest (on a reduced debt) offered no value to Tiger unless it believed that Halls faced imminent bankruptcy and withdrawal liability.

The security interests which Tiger and the banks received in the Bodford gift actually crushed Hall's as they prevented Hall's from obtaining any further credit or financing, Petition, p. 95a. There is obvious pretext when a company asserts a desire to continue operations and that a need for cash was the driving force in a transaction but takes a security interest which denies further cash to the company in need.

The question on undisputed facts thus is simply whether a transaction which makes no economic sense for the seller

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[2] The arbitrator mentions the retained 25% interest, Petition, p. 131a, but omits the Tiger Form 10-K with an immediate write-off of the retained interest as worthless. Harter, Tiger's counsel, admitted that the retained interest was an embarrassing mistake which left Tiger open to the "gun to its head" of withdrawal liability in Bodford's redemption ploy. The 75% ownership level meant that other companies owned by the buyer would not assume Hall's withdrawal liability. See 26 C.F.R. § 1.414(c)-2(b)(2), (c) (80% common control required).

without avoidance of withdrawal liability runs afoul of 29 U.S.C. § 1392(c). *Santa Fe,* as well as *Banner Industries, Inc. -and- Central States, S.E. & S.W.A. Pension Fund,* 11 Employee Benefits Cas (BNA) 1149 (Graham, Arb. 1989) and *The Sherwin-Williams Company -and- New York State Teamsters Conf. Pension and Retirement Fund,* 17 Employee Benefits Cas. (BNA) 2725 (Gertner, Arb. 1994), have concluded that the Fund applied the correct standard to find liability. Arbitrator Nagle and the Third Circuit, through *Dorn's Transportation* and this case, have applied an entirely different and imposible standard which precludes liability if a company, per *Banner,* 11 E.B.C. at 1181, ". . . rid[s] itself of a failing subsidiary by propping it for some, unspecified, length of time as long as it can subsequently demonstrate that the subsidiary had some possibility of survival."

CONCLUSION

The Court should grant *certiorari* to resolve the conflict in the circuits and protect the nation's pension system.

Respectfully submitted,

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RE: AAA Case No. 14 621 0004 89 Q
Flying Tiger Lines, Inc., et al. and
Teamsters Pension Trust Fund
of Philadelphia & Vicinity

Gentlemen:

There follows a list of some of my tentative reactions and comments regarding the evidence and arguments in the above case, based upon my review of the briefs and record to date, as well as some specific questions. I thought these might be helpful for purposes of focusing the discussion during the oral argument that has been scheduled for Thursday, July 22. By providing these comments and questions I do not intend to foreclose

either party from covering other matters that it might wish to address.

1. Tiger's evidence supporting the proposition that sale of Hall's was necessary in order to achieve an ESOP or obtain additional lender support seems rather thin. Moreover, under all the circumstances it seems somewhat implausible that Cronin and Tiger management would not have had greater awareness than has been represented regarding the full significance of Hall's potential MPPAA liability.

2. The significance attributed by the Fund to its "smoking guns" appears greatly overstated. For example, I see no significance to Whit Lee's statement, as reported in the Goffman memorandum, that upon his purchase of Hall's he would be assuming its $38 million pension liability. The Lafferty memorandum suggests that Cronin had greater concern regarding Hall's MPPAA liability than Cronin has acknowledged, but certainly does not constitute a "direct admission of Tiger's evasive purpose" as the Fund has claimed for all of the "smoking guns."

3. The Imm memorandum, insofar as it may be assumed to reflect what he was told by Tiger representatives, does indicate that a purpose of the sale, or at least its timing, was to avoid having to disclose Tiger's potential MPPAA liability. With regard to that point, the Fund repeatedly equates Tiger's possible desire to avoid having to disclose a potential withdrawal liability with a violation of Section 4212(c). I'm not at all sure the two are the same.

4. In connection with the last item, just what disclosure did Tiger avoid making in its February 1985 registration statement that it would have had to make absent the sale?

5. Arguably the case can be made that absent MPPAA, Tiger could have done better by liquidating Hall's rather than selling it as a going concern, at least

under the terms that it did. Once withdrawal liability is taken into account, however, liquidation would seemingly have been foolhardy. Under such circumstances, is it the Funds' position that if Tiger wished to dispose of Hall's it could avoid running afoul of Section 4212(c) only by liquidating? Does the answer to that depend on what Hall's prospects for survival were at the time of the sale? If so, how impaired must Hall's prospects for survival have seemed at the time of the sale in order for Section 4212(c) to be implicated?

6. What does the evidence concerning Hall's eventual failure and the reasons for it tell us about how its chances for survival after the sale should have been evaluated in December 1984?

7. In *Dorn's Transportation Co.* the Third Circuit held that "when the seller enters a transaction to escape liability, but the buyer has no intention of taking subsequent action that will reduce the payments owing to the Plan, it does not appear that a 'principal purpose of the transaction' as a whole is to escape liability." In that case the buyer's lack of awareness of the seller's potential liability established that it did not enter the transaction for such purpose. In the present case Bodford was aware of the potential liability, but since the evidence indicates to me that his intent was to make a success of Hall's as a continuing contributor, the principle of the *Dorn*'s decision would seem to apply. While the Third Circuit, in *Flying Tiger* and *Colteryahn Dairies*, has since referred to the "unusual circumstances" of *Dorn's* and the narrowness of its holding, I read those references as applying to its holding allowing arbitration to be bypassed, not to its ruling as to the meaning of Section 4212(c). Since I believe I am governed by *Dorn's*, I invite further comment and argument concerning its application here.

8. In *Concrete Pipe & Products v. Construction Laborers Pension Trust*, the Supreme Court concluded that under Section 4221(a)(3)(A) the burden is on the

employer in a MPPAA arbitration proceeding to disprove by a preponderance of the evidence that a principal purpose of the sale of Hall's was not to evade or avoid withdrawal liability. Does either party have any comments on the application of the Supreme Court's decision?

9. In connection with the accrual theory of liability is it the Fund's position that Hall's itself had no withdrawal liability?

10. With respect to the Fund's invoking of § 405 of MPPAA in connection with its accrual theory argument, what is the relevant provision of MPPAA whose application "to a particular circumstance is to be set forth in regulations"?

Very truly yours,

/s/ Robert E. Nagle
ROBERT E. NAGLE
Arbitrator